No. 2904

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

R. A. GRAHAM,

*Appellant,*

vs.

THE J. D. SPRECKELS & BROTHERS COMPANY (a corporation) and the SOUTHERN PACIFIC COMPANY (a corporation),

*Appellees.*

## BRIEF FOR APPELLANT.

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*Attorney for Appellant.*



*Filed this.....day of January, 1917.*

*FRANK D. MONCKTON, Clerk.*

*By.....Deputy Clerk.*

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### Abstract of Questions Involved.

A detailed statement of the facts, together with an exposition of the legal questions involved, will be hereafter given in this brief.

In order, however, that the Court may understand the general nature of the controversy, the following brief abstract called for by the Rules, is given:

This action was commenced, in conversion, against the defendants, and it was alleged that the defendant, J. D. Spreckels & Bros. Co., had unlawfully converted to its own use, by selling to the Southern

Pacific Company 20,000 shares of stock of the Coos Bay, Roseburg and Eastern Railroad and Navigation Company of the alleged value of $600,000, and 620 bonds of said Company of the value of $620,000.

By amended complaint the action was amplified into a general equity suit. The history of the controversy between the plaintiff and the defendants is long and involved and it will not be necessary to review it here for the purpose of stating the nature of the questions involved.

In brief, however:

The plaintiff, R. A. Graham, was the builder of the Coos Bay, Roseburg and Eastern Railroad and Navigation Railway. After having taken the contract for the building of said road he acquired all of the stocks and bonds and subsidies of the said railroad corporation. Later the defendant, J. D. Spreckels & Bros. Co. became interested in financing the building of the railroad The Spreckels Company took from Graham an agreement by which Graham delivered to the Spreckels Company 10,001 shares out of the 20,000 shares of the Railroad Company, and agreed to deliver the bonds of the Company as they should be issued. The bonds were to be issued as the road progressed. The Spreckels Company became the financial agent and was to have interest on all moneys advanced; was made sole agent for the sale of bonds; was to receive a commission for the sale of the

bonds, a bonus on all moneys advanced, and ten per cent of the profit of the building of the railroad.

The Spreckels Company agreed to finance the building of the railroad from Marshfield on the coast through Myrtle Point to Roseburg in the State of Oregon (Tr. pp. 204 and 23 and 272). Graham carried out his contract and completed the road to Myrtle Point, delivering over in addition to the stock of the corporation $620,000 par value of the bonds and assigned over all the railroad subsidies and lands, amounting to about $200,000 (Tr. pp. 203-231-232-233). The Spreckels Company having refused to carry out for the present its agreement to finance the road through to Roseburg, on account of alleged depression in the bond market (Tr. p. 237), the plaintiff Graham was faced with the necessity of producing freight for the railroad, and thereupon acquired, after an expenditure of $10,000 of his own funds (Tr. p. 249), a working contract on the Norman mining lands of great value, and graded a railroad to it from the line of the Coos Bay Railway at his own cost of about $30,000 (Tr. p. 241), making a total of $40,000 (p. 249). Later, this contract, without profit to Graham, was transferred to A. B. Spreckels, who formed a corporation known as the Beaver Hill Coal Co. with a capital stock of 5000 shares, 2500 of which were put in the name of Graham but retained by the Company not to be delivered until the profits should pay for them (Tr. pp. 244-6-249). Graham was made manager at the bare living

salary of $150.00 a month, plus payment of the premiums on two life insurance policies, one for the benefit of Mrs. Graham and the other assigned to The Spreckels Company, but payable to Graham in case he should outlive its maturity (Tr. pp. 256-7-8). He outlived the maturity of the policy, but as will be hereafter explained The Spreckels Company still retains and is contesting for the proceeds of this policy, in the Federal Court at San Francisco. At the time of the completion of the road to Myrtle Point and the inception of the Beaver Hill Coal Co., Graham had invested of his own funds $240,000 and had contributed the land at Marshfield, valued at $200,000 (see Tr. pp. 258-259). [N. B. By clerical error in the transcript Graham appears to say that he received the money on this policy. This is an admitted error of typing as is made clear from other parts of Graham's testimony. The money is on deposit in an interpleader suit brought against Graham and Spreckels by the New York Life Insurance Co. (see Graham, Tr. p. 472).

Friction arose owning to Spreckels trying to obtain control of the mine. Spreckels, violating all his contracts, ordered Graham to San Francisco and suddenly demanded (p. 271) his signature to a promissory note for $523,000, $217,011 of which was made up of interest bonuses and interest on bonuses, compounded quarterly (Tr. p. 630). Graham refused to sign on the ground that it was a violation of all their agreements and meant financial ruin to him, and stated that it was evident

that The Spreckels Company had decided to force him out of business; but he was finally induced to sign under the promise that he would be continued as manager, given $65,000 capital to complete the operations of the mine, and the 2500 shares of the Beaver Hill stock; also the life insurance policy of $50,000 was to be returned to him (Tr. pp. 275-6). Graham left the city, and on arriving at home discovered that the moment he left San Francisco Spreckels had broken all his contracts and promises. Graham was discharged from managing the mine; his powers of attorney revoked; an enemy by name of Chandler, who had been spying at the mine for Spreckels was placed in charge at a salary of $4000 a year (Tr. p. 570). Thereafter The Spreckels Company, in order to ruin Graham, shut down the mine in order to deprive the railroad of its freight and later commenced a series of actions against Graham, designed to ruin his connection with the railroad, destroy his financial credit and drive him into bankruptcy.

The Spreckels Company, having deprived Graham of his income and while it had $6,000.00 of Graham's money in its possession—enough to pay the interest on the $523,000.00 note for months—and while nothing was due on the note suddenly commenced action to foreclose all the securities on the promissory note.

The suit went to trial and while on trial was halted by an agreement dated June 8th, 1899. This contract is appended to this brief, for convenience,

and is marked *Exhibit "A"*. Its provisions are too numerous to detail here but in short its outstanding features are as follows:

The Spreckels Company delivered Graham's securities, bonds, stocks, deeds, etc., which it held as collateral to the Bank of California. Graham was given six months in which to pay $550,000.00 and draw down his property. A judgment was entered against Graham by stipulation in the pending suit on the $523,000.00 note and *this debt and the judgment for the debt were kept alive during the whole six months' period.* It was provided that if *at the expiration of six months* Graham did not pay the $550,000.00 that AT *the expiration of six months* the title should pass to The Spreckels Company.

There are many other provisions.

This contract was drawn at the suggestion of Collis P. Huntington, president of the Southern Pacific Company, who promised to come to the relief of Graham, and who agreed for the Southern Pacific Company to pay over the money to enable Graham to redeem his properties and who was then to have a contract covering the future of the railroad and mine.

As detailed hereafter, The Spreckels Company, knowing whence the money was to come, deliberately set about, through its attorney, to destroy Graham's ability to get the money and succeeded in persuading the Southern Pacific Company not to pay the $550,000.00, promising that The Spreckels Company

on securing Graham's property would negotiate its own arrangements with the Southern Pacific Company, agreeably to both those companies.

Graham, by virtue of Spreckels' bad faith, was unable to pay the $550,000.00. The Bank of California, over the protest of Graham, delivered all of the property deposited with it to The Spreckels Company, who seized the railroad by force and later sold to the Southern Pacific Company for $1,300,000 —a sum vastly greater than all amounts ever due by Graham to The Spreckels Company.

The legal questions involved are as follows:

First: *That the contract of June 8th, 1899, is on its face a mortgage, pledge or security and not a conditional sale of Graham's properties as contended by the defendants.*

Second: *The contract of June 8th, 1899, was made under such circumstances of duress and oppression, and as the result of such a prolonged course of consistent oppression and coercion by the creditor, The Spreckels Company, over its debtor, R. A. Graham, that equity will hold it to be a mortgage, pledge or security with a right on the part of Graham to an accounting and the right to redeem, and, in view of the sale to the Southern Pacific Company, which had full notice, to a judgment.*

The facts in detail appear hereafter in the statement of facts.

**Statement of Specifications in Which Decree is Erroneous.**

The assignments of error are set forth on pages 181 to 185 of the transcript. They are sixteen in number, and all of the assignments are relied upon. They raise for decision by this Court two questions, namely:

1st. *Was the contract of June 8, 1899, an instrument in the nature of a mortgage, pledge or security, by which the plaintiff, R. A. Graham, did not part with the title to his property, and under which he could not be deprived of his property without appropriate action to terminate his right of redemption?*

2nd. *Was the contract of June 8, 1899, executed as the culmination of oppressive acts exercised by the creditor, The Spreckels Company, over the debtor, R. A. Graham, and under circumstances which require a court of equity, in justice, to declare it to be a mortgage, pledge or security?*

The assignments merely raise the various elements of these questions and challenge the correctness of the decree dismissing the complainant's bill on the two broad grounds above set forth.

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**Statement of Facts.**

This is an appeal from a decree of the District Court of the United States for the District of Oregon, dismissing a bill of complaint filed by the appellant, R. A. Graham.

This action was originally commenced in the Circuit Court of the State of Oregon, charging the defendants with the conversion (a) of the entire capital stock of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, consisting of twenty thousand shares of the par value of one hundred ($100) dollars each and of the actual value of thirty ($30) dollars each, or a total of six hundred thousand ($600,000) dollars, and (b) of all the bonds of said company, amounting to six hundred and twenty thousand ($620,000) dollars (p. 3).

Thereafter, the action against the defendant was amplified by the filing of an amended complaint under the act of Congress permitting the changing of a cause from law to equity and this amended complaint, involving the same property, itself forms a practical statement of the facts upon which the plaintiff relies (Tr. pp. 15-46).

The testimony of the plaintiff R. A. Graham appears on pages 200 to 474 inclusive of the transcript. It forms a vivid and graphic picture of the systematic acts of oppression by which he was driven to financial ruin. The striking feature of this remarkable narrative is that it stands practically undisputed in every essential detail; and is at every step fortified by the entries in his diaries made throughout the years in controversy. Notwithstanding A. B. Spreckels, John D. Spreckels, Secretary Samuels and W. D. K. Gibson, treasurer, were alive, those who appeared at the trial were compelled to admit or failed to deny every essential charge; while

the defendant A. B. Spreckels, although alive and an office holder of San Francisco, failed to testify at all although much of the most vital testimony related to his acts.

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**HISTORY OF THE PROCEEDINGS UP TO AND INCLUDING THE MAKING OF THE CONTRACT OF JUNE 8, 1899.**

About the year 1890, the plaintiff, R. A. Graham, engaged in the building of the Coos Bay, Roseburg & Eastern Railway, commencing at Marshfield, Oregon, and to be projected through Myrtle Point to Roseburg in the same state. He took over the corporation formed by the community for building, the railroad with all its subsidies, etc. (pp. 200-201).

The defendant, The J. D. Spreckels & Brothers Company, became interested with Graham and agreed to finance the building of the railroad through Myrtle Point to Roseburg (Tr. pp. 204 and 237; also 273).

Graham agreed to deposit the bonds of the railroad as rapidly as issued and also a majority of the capital stock of the railroad as security; Spreckels was to receive interest at seven per cent, a five per cent bonus on advances and was made the sole agent for the disposition of the bonds and was to receive ten per cent commission on the sale of the bonds *and also a ten per cent commission on the amount of profit in the cost of the construction of the railroad from Myrtle Point to Roseburg* (Tr. pp. 203-4-229).

The witness, J. D. Spreckels, who was the only one of the Spreckels brothers to take the stand, admitted these contracts when confronted by them, but professed to have forgotten all about them (Tr. p. 550).

Some small modifications as to commissions and the like were made (Tr. p. 230) and it was the agreement between the parties that The Spreckels Company should be reimbursed for all of its expenditures *out of the proceeds of the sales of the bonds when sold* (Tr. p. 231).

Pursuant to the agreement, the appellant, Graham, delivered to The J. D. Spreckels & Brothers Company all of the bonds as fast as they were issued, the majority of the stock of the railroad company, the subsidy list which had been subscribed by the community for the encouragement of the railroad (p. 200), and the contracts by which Graham was to receive about two hundred thousand dollars in real estate on the Marshfield water front (Tr. pp. 231-2-3).

Graham went forward with the construction of the railroad and completed it to Myrtle Point—a distance of twenty-seven miles—having contributed about one hundred eighty thousand dollars of his own funds, and Spreckels about a like amount (Tr. pp. 232-3). By the time the railroad was completed to Myrtle Point Graham "had turned over to J. D. Spreckels Co. this land that was set out later in the note, the 10,001 shares of stock and 620 bonds of a thousand dollars each" (pp. 232-3).

At this time, Spreckels, finding that he could not as readily dispose of the bonds as his firm had anticipated, came to the conclusion, regardless of his agreement, that the railroad should stop at Myrtle Point until the market improved (see Spreckels' letter, p. 237), notwithstanding there had been no modification of his agreement to build to Roseburg (Tr. pp. 273 and 237). Graham had been depending upon the railroad reaching Roseburg in order to get freight and through the Spreckels' failure to advance the necessary means in accordance with the agreement, was compelled to look to other sources in order to develop freight to carry over the railroad. Accordingly, Graham located a field of valuable coal mines and secured a working option thereon from a man named Norman (Tr. pp. 239-240). Graham expended about ten thousand ($10,-000) dollars of his own funds in developing this mine, and about $30,000 in grading a railroad to it from the Coos Bay Railway, making a total expenditure of $40,000 from his own funds (Tr. pp. 240 and 249). He brought the matter to the attention of The Spreckels Co., who proposed that it take over the mine, form a corporation, issue half of the stock in Graham's name, but hold it in the possession of the company, and agreed to thoroughly equip the mine and put Graham in charge as manager (Tr. pp. 244 et seq.). Graham surrendered his contract for the purchase of the mine without profit of any kind (Tr. p. 472); he did not receive "a cent for it" (Tr. p. 472); the corporation was formed

under the name of Beaver Hill Coal Company, with a capital stock of five thousand (5,000) shares, of which twenty-five hundred (2,500) were issued to Graham who regularly attended the meetings of the directors thereafter. By the time the railroad was completed to Myrtle Point, and the inception of the Beaver Hill Coal Co., Graham had invested of his own funds $240,000 and had contributed the lands at Marshfield valued at $200,000 (see Tr. pp. 258-259). Graham was receiving no salary from the railroad company and never received any, notwithstanding he built the road. To encourage the development of the mine, Graham agreed to accept $150 per month as a salary to cover his bare expenses (Tr. p. 472), and The Spreckels Company was to pay the premiums on two life insurance policies for $50,000 each, one being made payable to Graham's wife, and the other was assigned to The Spreckels Company, under the agreement that it was to be returned if Graham outlived its maturity (Tr. pp. 255-257).

Graham devoted himself to the development of the mine which required the building of a village for miners, importing negro miners from Virginia, building a hospital, local school, installing of compressors, and doing a vast amount of development work (Graham, Tr. p. 262; admissions of Samuels, Tr. pp. 606-612). Then Graham began to ship coal over the railroad as fast as it could be developed, this being practically the entire source of freight to the railroad. Thereafter, friction arose because

The Spreckels Company insisted upon larger quantities of coal being shipped in spite of the protests of Graham and his expert that to tear out coal faster would be to destroy the mine as it was necessary to project the tunnels to the rear of the ledges and pull out the coal, allowing the mine to cave in behind, whereas if the coal were taken out from the front, the entire roof would have caved in and destroyed the mine (Tr. pp. 262 et seq.).

The Spreckels Company from this time on, clearly determined to acquire possession of everything Graham had. A series of petty persecutions were commenced and intolerable demands were made. A hostile, so-called expert, by the name of Chandler, who was utterly discredited on the witness stand for frank perjury (see Tr. pp. 579-580), was sent by The Spreckels Company to the mine, ostensibly to study certain drilling operations and relieve the strain on Graham, but really to undermine and supplant Graham (Tr. pp. 266-268).

Witness Samuels testified (Tr. p. 617):

> "When I sent Mr. Chandler up I expected to get control of the property and books so we could get a chance to expert them; that was one thing I had in view."

Graham brought the output of the mine up to one hundred and fifty tons a day, furnishing freight to the railroad (Tr. p. 297); nevertheless The Spreckels Company was constantly subjecting him to criticism and annoyance. Finally, without warning, Graham was summoned to San Francisco (Tr.

p. 271) and immediately upon entering the office of The Spreckels Company, A. B. Spreckels placed before him a note for five hundred twenty-three thousand ($523,000) dollars, and demanded his signature,—notwithstanding there was a contract which Spreckels had violated, to finance the building of the railroad to Roseburg, on an open account, and keep Graham as manager of the mine. Graham protested against the breach of faith, stated that Spreckels evidently intended to supplant him at the mine, deprive his railroad of all income and force him financially to the wall. A. B. Spreckels protested that nothing of the kind was intended and, after an adjournment of the meeting, promised that Graham should not be disturbed as manager of the mine but should have his employment continued.

Graham demanded to know whether the signing of the note would affect the contract by which Spreckels had agreed to finance the completion of the road to Roseburg and was assured that it would not affect the contract in any way but would merely transfer an open account to a promissory note. Graham protested that it would be utterly impossible to pay the interest monthly as provided in the note and stated further that his entire income was to be developed from the railroad. A. B. Spreckels thereupon assured Graham that the interest would not be required monthly and that he could have such time as he required, would not be forced to pay the interest monthly, would not be disturbed in the operation of the mine, and that the income which he received

as salary from the mine would not be interfered with.

Graham protested that he would not sign the note unless given at least two summers to develop the mine, which meant at least an extension of six months to a year. A. B. Spreckels then, as a further inducement to the signing of the note, promised to deliver to Graham the 2500 shares of stock standing in Graham's name on the books of the Beaver Hill Coal Company and to deliver back the life insurance policy on Graham's life then held by Spreckels and to extend the note six months, if desired (Tr. pp. 280-283). A. B. Spreckels stated that the policy and stock were locked up in the safe and urged Graham to return to Marshfield, stating that he would forward the policy and stock by mail (see the history of this entire series of episodes, Tr. pp. 271 to 279).

*Of this note for $523,162 only $306,151 was for cash advanced. The remainder—$217,011—was for bonus, commission, and interest on bonus and commissions compounded quarterly!* In other words, where one thousand dollars was advanced to Graham, a commission or bonus for making the loan was charged at the same moment and then interest compounded on the whole (see testimony Treasurer Gibson, Tr. p. 629).

Thus while Graham was furnishing $240,000 of his own funds, plus $200,000 in property Spreckels was advancing only a trifle over $306,000 and was to

be repaid out of Graham's securities in spite of the fact that they had broken every contract under which the company secured these securities.

Upon the signing of this note, events disastrous to Graham swiftly followed. Graham met A. B. Spreckels and John D. Spreckels in their office the next day. A stormy meeting ensued; Spreckels having secured Graham's signature to the note, had entirely changed front, *and demanded a cancellation of the contract with Graham and his resignation as manager of the Beaver Hill Coal Company.* The meeting resulted in nothing, Graham refusing to surrender his contracts and finally, A. B. Spreckels demanded that Graham make an estimate of the amount necessary to complete the development of the mine. Graham returned and gave to A. B. Spreckels his estimate, which was $65,000. Thereupon, A. B. Spreckels *agreed that there should be advanced for the completion of the mine, $65,000; that Graham should be confirmed in the management of the mine for at least a year and have the proceeds of his Beaver Hill stock.* A. B. Spreckels directed Graham to have attorney Deering draw up the memorandum of agreement. This was done, approved by Spreckels, who stated that it would be signed immediately on the return of his brother, and he directed Graham to return to Marshfield. This Graham did. Immediately on Graham's departure, Mr. Samuels, Secretary of The J. D. Spreckels & Brothers Company, interfered and *he and A. B. Spreckels decided to repudiate the contract and*

*all the promises made,* and as Graham landed at Marshfield there was delivered to him a telegram from Spreckels informing him of a special meeting of the Beaver Hill Coal Company in San Francisco, followed immediately by a letter notifying him of the meeting (see history of entire transaction, Tr. pp. 279 to 291).

Witness Samuels testified (Tr. p. 603):

> "If Mr. A. B. Spreckels had promised to advance sixty-five thousand dollars to Mr. Graham and had agreed to keep him in as manager for a year, you know I would have killed it if I could. *As a matter of fact I did kill such a contract, otherwise it would have been signed.* I recall that that was in connection with a contract drawn by Mr. Deering" (see again Tr. p. 622).

Graham realized that Secretary Samuels, who was hostile, had succeeded in "killing" the contract (Samuels admits this, Tr. p. 603), and persuading Spreckels to violate all his agreements, and wrote The Spreckels Company saying that he fully realized that it was their intention to oust him from the mine and that if he had to yield, he would do so without contest (Tr. pp. 290-291).

Spreckels repudiated the entire agreement and all inducements by which he had forced Graham into the signing of the note for $523,000 (see Graham's letter to Spreckels stating the facts, Tr. p. 453). The agreement to deliver the life insurance policy and the Beaver Hill stock was repudiated and Spreckels has ever since continued to hold the

life insurance policy and is, today, litigating for its proceeds, notwithstanding the original agreement by which it was to become Graham's property if it matured during his lifetime, and the second agreement to deliver it back. Likewise, the entire series of inducements to the signing of the note were boldly repudiated (Tr. p. 472). Graham had no warning he was to be discharged and cut off from his salary. His policy for his wife thereby failed and Spreckels retained the other (Tr. p. 472).

Spreckels had planned, during the whole time, to first get Graham's properties tied up under the collateral note for $523,000, under any inducement, and then break his promise and discharge him. John D. Spreckels (Tr. p. 544) testified:

> "At the time I demanded the execution of this note, I was aware that the name of my firm was signed to certain contractual obligations. I did not know about all of them. * * * *I nevertheless ordered personally, the making up of this note.* I knew at the time I sent Mr. Chandler up there or authorized Mr. Samuels to send him up there, *that the major portion of the freight furnished to the Coos Bay Railroad was supplied by the Beaver Hill Coal Company.* * * * *At the time the mine was shut down I knew it necessarily would cut off a large part of the income of the Coos Bay Railroad.* * * *"

and at page 551 John D. Spreckels testified:

> "At the time I gave Mr. Samuels instructions to draw up that note and have it signed, I think *about the same time I also advised him that Mr. Graham was to be removed.*"

and at page 552 John D. Spreckels testified:

> "* * * *I will admit that at the time I wanted this note drawn up, I had in mind the discharge of Mr. Graham either at that time or immediately after.* At any rate, at the time I drafted the note or ordered the note to be drafted, *I sure had in mind the removal of Mr. Graham.*"

Graham was then confronted with the following situation: Without coal furnished as freight, the railroad would be without an income. Spreckels Brothers had the only steamers for carrying coal and they were threatening to remove the steamers and leave his mine and railroad isolated. They had control of all of the distributing agencies in San Francisco and Graham knew that if he did not yield he would be utterly ruined at once. Graham never expressed any intention to resign, but at a meeting of the board of directors on December 3, 1897, Graham was removed and all his powers of attorney and contracts with the mining company were canceled and W. S. Chandler, who had been sent originally to the mine to spy upon him and undermine him, was appointed in his place, and Graham was directed to surrender everything to Chandler. Graham, anxious to preserve the road by securing a continued output of coal, threw no obstacles in Chandler's way but yielded to the inevitable and gave him every assistance (see Tr. pp. 290 to 295).

Three weeks after being removed as manager of the coal mine, Graham went to San Francisco and

paid the interest to date on the $523,000 note (Tr. p. 295) and in the following month, Graham, while in San Francisco on the way to New York, where he had an interview with Mr. Huntington by which the Southern Pacific became interested in the project of taking over the railroad, met A. B. Spreckels. *Spreckels thereupon demanded that Graham turn over the management of the road and threatened Graham that unless he immediately surrendered the railroad to The Spreckels Company, the latter would shut down the Beaver Hill coal mine, deprive the railroad of all of its freight and put Graham out of business* (Tr. pp. 295 et seq.).

Graham protested that he had put in seven years of bitter work and a large fortune of his own. Spreckels demanded to know how much Graham would take to sell out and offered Graham $300,000, which he refused. Graham went on to New York and immediately after he left, Spreckels, true to his threat, *shut down all operations* of the mine, thereby robbing the railroad of eighty per cent of its earning capacity (Tr. pp. 296-7). At the time of the shutting down of the mine, a vast body of coal was in sight and Graham had been sending out 150 to 200 tons of coal a day (Tr. p. 297). From the moment of his removal *Graham was shut off from all salary and income from the mine, and was deprived of all his earning power. Spreckels refused to abide by his agreement to return Graham's life insurance policy and the Beaver Hill stock* (Tr. pp. 328-9). The shutting down of the railroad deprived the railroad

company of any power to earn money, and rendered it impossible for Graham to pay from that source any interest on the $523,000 note, exactly as Graham had prophesied, in the stormy meeting with Spreckels (Tr. pp. 272 et seq.).

*Graham had, up to this time, devoted seven years of heavy labor without salary or reward in the building of the Coos Bay, Roseburg and Eastern Railway; had served absolutely without salary from the railroad; had put into the construction of the railroad itself about $240,000 of his own funds; had delivered over all of his subsidies and Marshfield lands; had turned over all of the rights to the Beaver Hill coal mine, and spur railroad on which he had expended $40,000 of his own money and performed enormous labor in developing these properties* (Tr. p. 258), *and was receiving only $150 per month, which was not sufficient to pay the living expenses of his family, and which had to be augmented by his wife taking in boarders; and was to receive the payment of the premiums on the two life insurance policies. The policy in favor of Mrs. Graham had to be abandoned because Spreckels shut off all of Graham's income; and the other policy, Spreckels, despite his contracts, converted to his own use and still holds in litigation in the federal Court at San Francisco.*

Notwithstanding The Spreckels Company had forced Graham out of the mine which he was honestly developing at enormous personal sacrifice, in return for a miserable salary of $150 per month,

Chandler was permitted to shut down the mine absolutely, *and draw a salary of $4,000 a year.*

Spreckels' secretary testified (Tr. p. 623):

> "We did not care what Mr. Chandler was doing up there while we were paying him $4,000 a year. * * * We put $300,000 into this mine, No. 2, after Mr. Chandler went up there. Mr. Graham shipped us 93,000 tons of coal; allow 95,000 tons from September, 1894."

Later this same Chandler was made by Spreckels, receiver of the Coos Bay Railroad, forcing Graham out, and he was paid as receiver $200 per month or $2,400 a year, for a railroad from which they had shut off the freight, and was receiving $4,000 from a mine which they had closed down, *making $6,400 a year for doing nothing but carrying out Spreckels' policy of ruining Graham. In all, this man Chandler received $6,400 a year for seven years, or $44,800 for doing nothing except carry out the vengeance of The Spreckel's Company* (see testimony of Chandler, Tr. pp. 570 and 568).

Graham, on being threatened by Spreckels with the shutting down of the mine, hurried to New York for a conference with Mr. Huntington of the Southern Pacific Company, at which he hoped to induce Huntington to take over the railroad and relieve the situation. The conference failed of accomplishment and Graham returned to Marshfield. He found that the shutting down of the mine had ruined the railroad and it was necessary to reduce expenses to the lowest possible amount. Spreckels'

action had taken the traffic from the railroad, just as Graham had told Spreckels that it would (Tr. pp. 298-301). Graham, having been shut off from other avenues of work, had purchased a cargo of logs on the Coquille River (Tr. p. 300), and had chartered a vessel through The J. D. Spreckels and Brothers Company and shipped the cargo of lumber to Spreckels Bros. Commercial Co. at San Diego. This cargo of lumber amounted to about $6,000,—more than enough to pay Graham's interest on the $523,000 note to November. Graham wrote to ask them to put the amount to his credit. Pursuant to the Spreckels' plan to ruin Graham, they refused to put this amount to Graham's credit and falsely claimed that the fund belonged to Spreckels (Tr. pp. 300-301 and 310-311).

Concerning this, even Samuels, secretary of The Spreckels Company, had to testify as follows (Tr. p. 613):

> "When he become sixty days in default on a disputed payment of interest on the note, I launched suit against him for the foreclosure of his securities after sixty days. We could have done it in thirty days. *We had a reason for doing it then. At this time, Mr. Graham had a dispute with me as to whether or not there was a credit in our hands for the logs shipped to the Spreckels Bros. Commercial Company. We had collected that money from the Spreckels Bros. Commercial Co. and would not pay it to him on his note.*"

Samuels then admitted his inability to show that the logs were not Graham's (see Tr. p. 614).

Spreckels then swiftly closed in on Graham and the correspondence between Graham and E. F. Preston, the attorney for The Spreckels Company, appears in the transcript (pp. 303-312). Spreckels demanded an accounting of Graham in a broad and general, but threatening letter (Tr. p. 303), and responding to the reply, Spreckels' attorney wrote as follows:

> "It would not be seemly for me to use, in a communication to your firm, the technical designation of the acts which we called in our last communication a diversion, and we do not propose to waste any time with Mr. R. A. Graham or his man Hassett (Hassett was Secretary of the railroad under Graham) concerning the situation that the principals meet. *The street is very broad which leads to the office of J. D. Spreckels & Brothers Company and to the office of the Beaver Hill Coal Company. There is no objection to Mr. Graham traveling it if he so desires*" (Tr. p. 304).

The Spreckels Company, through its attorney Preston, however, charged Graham with all manner of defalcations, embezzlements and the like (Tr. p. 619).

(It may be here proper to advert to the fact that at the trial in the Court below, not a syllable of testimony was offered proving that Graham ever diverted a single cent of money and Graham testified flatly that no such proof had ever been made. On the contrary, some testimony was offered of a vague nature, relative to certain items that could not be understood, but all of which were clearly ex-

plained by Graham. In fact, a large part of the defendants' case in the Court below consisted in the reading of an enormous bulk of collateral affidavits which had been introduced in other trials pending between the parties at the time of the controversy we are now discussing. These affidavits were filled with all manner of glaring generalities, unsupported by truth. While counsel for the defendants never clearly stated the purpose of reading these, it is assumed that it was for the purpose of attempting in the absence of evidence or proof, to besmear the character of Graham. Finally, upon being pressed for the theory upon which they were offered, over objection, Mr. Dunne, attorney for defendants, stated that they were for the purpose of showing good faith in the oppressive acts imposed upon Mr. Graham. Instead of showing good faith, they merely accentuated the force of Graham's charge that he was harassed and oppressed by his creditor Spreckels, who insisted on driving him to the wall to wring from him the property which had been built up as the result of his efforts.)

In response to the charges of embezzlement and threats of litigation, Graham was compelled to write on April 11th (Tr. p. 305) that he had no recourse in view of Spreckels refusing to credit him with the money and threatening him with actions but to commence a suit for the protection of himself and his creditors. He said:

> "In view of the obligations that have arisen in consequence of your shutting down the mine

> and failing to carry out your contract with me to furnish money to operate and maintain it, I have been advised by my attorney here to commence action to protect my interest as well as that of my creditors in this term of court commencing May second."

He thereupon urged an adjustment of differences by arbitration or otherwise, to prevent further trouble.

In response, Spreckels wrote, using this language (Tr. p. 307):

> "It is not our intention that this matter shall go without attention and we will try to convince you before we are through that we not only know our rights but that we are abundantly able to maintain them. *Had you offered any reparation, surrendered all the properties in your hands, and thrown yourself on our generosity, we would have been disposed to consider the past more leniently, but you do not appear to comprehend this view of the situation.*
>
> I am, Very respectfully yours,
>
> JOHN D. SPRECKELS."

Concerning these veiled illusions to diversions of funds Graham testified (Tr. p. 306):

> "I will interrupt to state that J. D. Spreckels Bros. & Co. never produced any evidence that I had ever diverted a single cent of the company's moneys from its affairs. They never produced any evidence to me or in any court that I had ever diverted to any use any money that was sent to that company for a specific use. No case ever commenced by them on any of these proceedings ever went to judgment against me."

Graham's books were kept by accountants and were regular and correct in every way (testimony of Hobbs, Tr. p. 502, and Marsden, Tr. p. 495).

Graham went to San Francisco to attend a meeting of the board of the Beaver Hill Coal Company and assert his rights but they refused to even see him (Tr. p. 309). Quickly following Graham's visit to San Francisco, Spreckels closed in on him in a series of suits designed to accomplish his complete personal and financial ruin. First of all, notwithstanding Graham had to his credit in Spreckels' hands, moneys more than sufficient to pay the interest on the note for $523,000, which Graham had ordered placed to his credit and which had been the subject of correspondence (Tr. p. 310), The Spreckels Company commenced foreclosure action on all of the collateral and securities under the $523,000 note (Tr. p. 302). Almost at the same time, The Spreckels Company, through the Beaver Hill Coal Company, commenced an action June 17, 1898, in San Francisco, charging Graham with fraud and embezzlement (Tr. p. 312) and immediately lurid articles appeared in the San Francisco Bulletin, copying the sensational allegations (Tr. pp. 313-319). Graham, at that very moment, was attempting to rescue himself from his financial straits by financing what was known as the Klondyke mine, being an individual mine which Graham developed and to which he built a railroad after being forced by The Spreckels Company out of the Beaver Hill Coal Company. Mr. Graham was engaged

in the business of financing this mine and had appointments with Mr. Henry Allen of the firm of Allen & Lewis. The day before the conference was to take place, the articles in the San Francisco Bulletin which had been forwarded by The Spreckels Company to Beaver Hill, were nailed on the stumps and posted on the windows of the Beaver Hill Coal Company's store and were spread broadcast throughout the country. Mr. Allen thereupon announced that Graham's credit was ruined and all matters came to a standstill (Tr. p. 313). This was done designedly by The Spreckels Company to ruin Graham's remaining credit. The Bulletin article, with its wild and sensational allegations, appears on pages 315-317 of the transcript. Concerning these statements Graham testified: "None of those charges against me were true." Even Samuels, the bitter and vindictive secretary of The Spreckels Company, was compelled to testify: "I couldn't prove that one thing that J. D. Spreckels & Brothers Company ever paid for ever went into Mr. Graham's private account over to the Klondyke mine" (Tr. p. 610).

In the complaint in the suit referred to in the Bulletin article, the Beaver Hill Coal Company made a sweeping claim for a judgment of $200,000. At the same time, the Examiner published an article which was introduced in evidence, from which we quote Graham's interview as follows as an admirable summary of facts actually adduced and unrefuted at this trial (Tr. p. 318):

"Mr. Graham says this suit is instigated with a view to injuring his credit in engineering a deal to control about nine thousand acres of coal land adjoining the 480 acres of the Beaver Hill property. 'I was the original owner of the Beaver Hill mines,' said he, 'and I still own a half interest. In 1894 I went in with the Spreckelses, they agreeing to supply the funds needed to develop the mine. The mine has not paid but it is immensely rich and I believe they are trying to freeze me out and get entire control. I have never misappropriated one cent. I got out last December and went East. In February they shut down working the mine. On June 7th I had a receiver appointed, bringing suit against the company to compel them to work the mine.

'I own the railroad leading to the mine, having borrowed $523,000 from the Spreckelses to build it. This money is not due until next November, yet on June 13th they sue me for that amount. When the mine is not working, the road does not pay. They evidently want to control the whole works. My accounts are not one dollar out of the way. If they are, why don't they have me arrested? Mr. Deering is my attorney and will show up the whole matter in court.'"

Continuing, Graham testified:

"That case was never tried. There was no truth in any of the charges brought against me in that complaint as stated in this article" (Tr. p. 319).

The Spreckels Company then sent attorney Frank Powers to Marshfield to demand the transfer to J. D. Spreckels and Brothers Company of the 10,001 shares of stock held by Spreckels, under

the pledge of the note, and it was refused (Tr. pp. 319-320).

Without Graham's consent, The Spreckels Company nevertheless transferred all of Graham's stock in the Beaver Hill Coal Company to A. B. Spreckels, and Graham was, without notice, removed as a director (Tr. p. 323).

The suit for the foreclosure of the securities under the $523,000 note came on for trial. Graham was in bad financial condition. He was borrowing money to carry on his little mine in Oregon known as the Klondyke Mine, to keep the railroad going and to fight the Spreckels' law suit and pay expenses (Tr. p. 328).

Spreckels, having broken his agreement to deliver back the life insurance policy and the stock in the Beaver Hill Coal Company, Graham's only property free from incumbrance during this litigation was his remaining shares in the Coos Bay Railway and his little Klondyke Mine, which was an undeveloped property (Tr. p. 329). To fight to sustain his rights, Graham found it necessary to borrow $70,000 from the Crocker, Woolworth National Bank of San Francisco, giving them notes and all his remaining stock in the railroad company and in the Klondyke Mine (Tr. pp. 329-331).

The foreclosure suit went to trial, was bitterly contested, and, as a result, an adjournment was had with a view to procuring a settlement. During the adjournment, Graham took the whole matter up

with Collis P. Huntington, president of the Southern Pacific Railroad Company, at his office (Tr. p. 334). Huntington advised Graham to get a six months' agreement and within that time Huntington was to furnish $550,000 to clear up the entire situation and take over all the properties of Graham.

Graham testified (Tr. p. 335):

> "I came to a settled and fixed understanding with Collis P. Huntington, President of the Southern Pacific Railroad Company, as to what that company and Mr. Huntington would do in the way of an arrangement with me. This understanding was the result of a great many discussions that had run over two or three years or maybe more. The discussions were ended up with the conclusion of Mr. Huntington that we should take six months. He stated his conclusions to me. The arrangement was that the Southern Pacific Company was to guarantee the interest and principal of these bonds; that guarantee would sell the bonds at 95, of the first bonds that were issued at this time, 620, I was to turn those over to the Southern Pacific Company, for which they would advance me $550,000, the amount we agreed upon to pay the Spreckelses, and then the balance coming to me out of the bonds would be given me as fast as the bonds were sold, and we had the assurance of Mr. Marsden, who was the President of the Farmers' Loan and Trust Company at that time, that the bonds would sell for 95 with this guarantee. In addition to that, we were to make a contract with the Southern Pacific Company, agreeing to deliver them all of the freight that we could gather in the territory of the Coos Bay Company, at Roseburg, at a fixed division or rates; we were

> to furnish them coal at Roseburg from the Beaver Hill mine at $3.00 a ton. It was two or three or four days prior to the signing of this agreement of June 8, 1899, that I came to my final settlement with Mr. Huntington, as I have just testified" (Tr. pp. 335-6).

This agreement having been arrived at, the Southern Pacific Railroad Company had Mr. Graham's affairs placed in the hands of Mr. John Garber, who advised him concerning his rights.

Having, therefore, secured an agreement with the Southern Pacific Company and Mr. Collis P. Huntington, by which the latter were to put up the $550,000 within six months, Graham had devised a plan by which he could escape from the clutch of his creditor, The Spreckels Company. The contract, however, was only made after Graham had been financially ruined, driven to the wall, and repeatedly sued; had all his physical properties involved in litigation and was likewise being threatened with all manner of civil and criminal prosecutions by E. F. Preston, the Spreckelses' attorney.

The deposition of W. L. Pierce, attorney associated with Mr. Preston, for The Spreckels Company, which appears at page 474 of the transcript, was taken on behalf of the defendants. Pierce makes clear that Spreckels' attorney was threatening all manner of criminal actions against Graham (Tr. p. 478); likewise, Samuels, secretary for The Spreckels Company, testified (Tr. p. 619):

> "In the making of the agreement of June 8, 1899, he was threatening Mr. Graham that

> he would send him to jail on two or three criminal charges; we were expecting he would. * * * and we were threatening him with embezzlement and with perjury and with other crimes; everything up to larceny; it might have included larceny; it did include embezzlement and included perjury. * * * My impression was there were two suits about the same time,—one for foreclosure and the other for accounting. Mr. Preston was hurling charges at Mr. Graham on the witness stand. We charged him in another case with a hundred thousand embezzlement. It was written up in the San Francisco Bulletin."

As a result of his financial straits, brought about by the repeated breaches of obligation on the part of Spreckels, the numerous suits which had destroyed his credit and taken from him his whole income, Mr. Graham,—harassed, oppressed, coerced and driven to the wall,—was compelled to make a settlement which he entered into June 8, 1899. He was compelled to make the best arrangement that he could with Collis P. Huntington and the Southern Pacific Railroad Company, and finding no escape, Mr. Graham entered into this final agreement which is set forth as an exhibit to the amended complaint (Tr. p. 46), and to this brief (see Exhibit A).

Graham's purpose was to secure time to pay in the money promised him by the Southern Pacific Company and thereby redeem his fortunes.

This contract Graham was advised by his counsel, Judge John Garber, was a mortgage and in no

sense a sale or forfeiture of his properties (Tr. p. 339). And before signing the contract Graham personally struck out all clauses providing for indorsements of stock and transfers of title because he refused to sign anything which would convey away his property or prevent his redeeming (see Graham's testimony, Tr. p. 338).

By this agreement, Graham not merely delivered up into the hands of the Bank of California all securities and properties which he had theretofore delivered as collateral to John D. Spreckels & Brothers Company, *but he likewise delivered up other properties which had never theretofore been in the possession of Spreckels, namely, all ownership in what was known as the Klondyke Spur Railroad, which had been built by Graham to connect with an adjoining mine at a cost of at least $25,000* (Tr. p. 348). *During all these negotiations Spreckels knew that the $550,000 was to come from the Southern Pacific Co. He so informed them* (Tr. p. 339).

We have thus traced the coercive process by which Graham, an oppressed creditor, was driven into the making of a contract by which he was given six months further time within which to redeem his securities and by which he placed in the hands of a third party the properties not theretofore pledged and which by the provisions of the agreement, if not redeemed in six months, were then to be transferred over to the creditor.

In all the experience of the writer of this brief no case, either in the courts or in the books, can be

compared with this for cold-blooded, relentless and systematic crushing of a debtor. Every contract that stood as an obstacle to the plan of pillage was a "mere scrap of paper". And more remarkable still, R. A. Graham's testimony, fortified by entries in his diaries extending over many years, and supported by documentary proofs, was *not denied or assailed in a single essential particular.* Of the Spreckels Brothers only one appeared, and he only to confess his forgetfulness and utter indifference to the ruin his breaches of faith had wrought. His subordinates who testified exhibited venom but could supply no facts.

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### HISTORY OF THE PROCEEDINGS FROM JUNE 8, 1899, TO THE SALE BY SPRECKELS TO THE SOUTHERN PACIFIC.

The six months provided by the instrument within which Graham was to pay $550,000 elapsed. Graham did not pay the money. The reason he did not pay it was because Spreckels & Co., through its attorney, violated its obligations *and secretly and fraudulently caused the Southern Pacific Company to abandon its agreement to furnish the $550,000 under the promise that by refraining from making the payment, Graham would be unable to redeem; Spreckels would acquire the properties and thereafter sell the properties under a suitable arrangement to the Southern Pacific Company.*

This fraudulent scheme was consummated in the following manner:

Immediately after the agreement of June 8, 1899, was executed Graham, who had theretofore carried on all of his negotiations with the Southern Pacific Company through Collis P. Huntington, who had made a distinct and binding agreement for the Southern Pacific Company, in the absence of Collis P. Huntington, took up the matter with George Crocker, vice-president of the Southern Pacific Company. Crocker had a preliminary discussion; thereafter, he had a second conversation with R. A. Graham, in which he informed Mr. Graham that Spreckels' attorney, Mr. Preston, had warned him not to furnish the money; had told him that in case the Southern Pacific purchased, it would merely be buying into a series of law suits with Spreckels; that if he would refrain from advancing the money, Graham would be unable to redeem the properties and after the expiration of the six months Spreckels and the Southern Pacific Company could make their private deal (see Tr. pp. 341 to 344).

Thereafter, Graham went to New York and took the matter up with Collis P. Huntington. On his arrival in New York, Huntington informed Graham that the situation had changed; that Spreckels' lawyer, Preston, had destroyed the entire plan of operations by his conversations with Vice-President Crocker and had either frightened or induced the latter into an abandonment of the agreement (Tr. p. 345); Huntington, however, was desirous of making every effort to carry out his contract, and

gave Graham letters to Speyer & Co., London, by which it was hoped that the London bankers might be induced to produce the money for the fulfillment of the contract. These negotiations failed and Graham returned to New York. He and Collis P. Huntington had extended interviews with Russell P. Sage, all of which are given by the faithful report of Graham's diary (Tr. p. 346).

Owing to the hostility of Vice-President Crocker, which had been brought around by the duplicity and bad faith of Spreckels Company, through its lawyers, Graham was unable to secure the money, and the six months elapsed (Tr. p. 347). Before the time elapsed, Graham wrote to the Bank of California, notifying the bank not to turn over the documents to Spreckels & Brothers (see Diary, Tr. p. 347). A copy of this letter was retained by Graham and sent, with his files, to Marshfield, where it was subsequently seized by the Spreckelses' emissaries, when they took over the railroad by force.

The agreement of June 8, 1899, provided among other things, that *at the end of six months* the stock in the railroad should pass to the Spreckelses in case of failure to pay. Graham had refused, in drawing the agreement, to indorse any stocks because he contended that he was not to transfer title, and he excised all clauses to that effect (Tr. p. 338).

As an indication of the extreme measures to which Spreckels was determined to go to secure

Graham's properties, the following is established by the evidence:

Chandler, the same witness who supplanted Graham and received $4,000 a year for shutting down the mine and keeping it closed, plus $2,400 a year for overseeing a railroad which they had deprived of its freight, was placed at the head of a band of plug-uglies and officers armed with rifles, at Marsh field, *to await the expiration of the six months period* (Tr. p. 509). Their purpose was to seize the road by force the instant the six months expired. This they did, entering the premises with guns and taking over the books, papers and effects, and forcing the secretary out of the office (Tr. pp. 509 and 496).

There being no board of directors left in office and in the control of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, the defendants Spreckels, who were about to consummate their deal by selling to the Southern Pacific Company, unlawfully reconstructed the board of directors in the following manner, as shown by the minutes of the board. They held fictitious meetings with no one present but J. W. Bennett, who wrote up the minutes from meeting to meeting saying that he had "adjourned himself", and then a fictitious transfer of stock was made, and an illegal board, thus elected, completed the "sale and transfer".

From the time that the Bank of California delivered over the papers at the end of the six

months period, in the face of Mr. Graham's protest (Tr. p. 347), a series of three events took place:

1st. The Spreckels Company, through its man Chandler and his armed men, seized the Coos Bay Railroad and the offices of the company (Tr. pp. 509-496).

2nd. A series of suits was commenced against Graham and others, as follows:

(a) J. D. Spreckels & Brothers Company v. R. A. Graham and others, and the Coos Bay Railroad, to bring about the reorganization of the railroad;

(b) Farmers' Loan and Trust Company, as holders of the bonds, against the Coos Bay Railroad Company, in which action Graham intervened to assert his right to the stocks and bonds in question here.

Inasmuch as in these suits, the plaintiff, Graham, signed certain stipulations and an answer (which will be hereafter explained), which are relied upon as matters in estoppel, the following testimony becomes material (Tr., commencing at page 369):

From 1902 until 1906 Mr. Graham was continually in negotiations in New York looking to the redemption of his property and its rescue from the grasp of The Spreckels Company. He first presented the matter to Mr. Harriman, president of the Southern Pacific Company, and asked him to take up the negotiations where they were left off by Mr. Huntington, who died about the end of 1900 (Tr. p. 369).

Mr. Graham gave Harriman the profiles of the railroad for examination (Tr. p. 370). Mr. Graham had many conferences with Mr. Couch Flanders, representing the opposition to him, with Mr. Wood of the firm of Williams, Wood & Linthicum (Tr. p. 370), and all of the attorneys representing the Spreckelses' interest were in conference with Mr. Graham's attorneys, looking to a settlement (Tr. p. 370).

During the year 1904 Mr. A. B. Spreckels was in New York and he sent a man by the name of George Crouch, a Wall Street broker, to Mr. Graham, and entered negotiations with a view to settling the ownership of the property (Tr. p. 370).

In 1904, likewise, Mr. Preston, attorney for The Spreckels Company, was in New York, and the matter of a settlement was likewise discussed, with a view to getting everything reorganized so that the railroad could be sold, and "so that everybody would get their money" (Tr. p. 371).

In this, Mr. Preston seems unqualifiedly to have admitted that Graham had claims which were unsatisfied and unsettled. With a view, therefore, to a settlement, Mr. Graham was persuaded to sign certain stipulations for the dismissal of pending actions in which he was involved and which involved the ownership of the Coos Bay Railroad properties. This was done after conferences looking to a settlement (Tr. p. 372).

During all these negotiations with the representatives of The Spreckels Company, with Harriman and

others, Mr. Graham was urging his right to the stock and bonds of the Coos Bay Railway and other properties. He says:

> "I was urging a discussion relative to the stocks and bonds of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company and other properties described in the contract of June 8, 1899, was that Mr. Spreckels had had an interest in this property of $550,000, with interest, from the commencement, from the date of that instrument,—that whatever other values were in the road were mine and that whatever the road could be sold for, first Mr. Spreckels should have his money, $550,000 and interest,—and the balance of the money I claimed all the time was mine" (Tr. p. 370).

Mr. Harriman, president of the Southern Pacific Company, was fully informed of all Graham's claims. Mr. Graham discussed the matter fully with Mr. Wood of Portland, attorney for The J. D. Spreckels & Brothers Company.

As a result of these various interviews with the representatives of The Spreckels Company, it was finally agreed that Mr. Graham should sign certain stipulations by which the pending litigation might be disposed of and the way be cleared for a sale of the properties to the Southern Pacific Company. Mr. Graham signed the stipulations and they were forwarded to Portland and filed in the actions, but were never acted upon, and no decree was entered in accordance therewith but the actions were simply dismissed (Tr. pp. 364-369). It was evidently the purpose of Spreckels to get the stipulations, not

that he might get judgment but might escape litigating Graham's claim by dismissing.

Thereafter, having secured the disposition of this litigation through the assistance of Graham, *who was relying on the promise of a settlement,* The Spreckels Company sold out the property to the Southern Pacific Company for the sum of $1,300,000 (Tr. p. 560), although John D. Spreckels could not even remember the amount and stated repeatedly that he candidly believed he sold for a million (Tr. p. 557).

Mr. Wood of the firm of Williams, Wood & Linthicum, was representing The Spreckels Bros. Co. had been evidently hopeful of securing a settlement and having heard of the sale to the Southern Pacific Company, Mr. Wood finally told Mr. Graham that the Spreckels people would not settle and that it would be necessary to fight it out in court (Tr. p. 338).

On this subject, Mr. Graham testified as follows:

> "*I never received anything for the signing of these stipulations.* After the stipulations were sent out here, I discovered some time in the fall of 1906—it was reported to me from Marshfield in a general way that the road had been sold out to the Southern Pacific Company. Subsequent to the sale to the Southern Pacific Company, I had a discussion concerning my rights with Mr. Wood, who had been representing the Spreckels' interests. I think I saw Mr. Wood in New York twenty times at the various discussions and it always was with the view of a settlement, for him to bring about this settlement in some kind of a form that would be

satisfactory; and I think it was as late as 1907 that he said to me: 'These people won't settle with you. If you have got any claim you have got to go and fight it out in court'. The value of the Coos Bay Railroad was thirty thousand dollars a mile and there was an equity worth twenty-five dollars per share in the stock over and above the par value of the bonds which was six hundred and twenty-five thousand dollars" (Tr. p. 380).

The land at Marshfield was valued at two hundred thousand dollars, and Graham's opinion of the value of his interest in the Beaver Hill Coal Company, conceding that he was entitled to twenty-five hundred shares, was two hundred and fifty thousand dollars (Tr. p. 381).

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## THE DEFENSES OF THE DEFENDANTS OUTLINED AND CONSIDERED.

The defendants rely upon practically the same grounds of defense, and they may be considered as follows:

### FIRST: That the Contract of June 8, 1899, was a Conclusive Settlement.

The contract of June 8, 1899, is pleaded as a full and complete settlement of all of the differences between the parties and it is asserted that the contract was a conditional sale and that immediately upon the expiration of the six months period the title to all properties passed absolutely to the J. D. Spreckels & Brothers Company. This theory is diametrically opposed to the construction placed

upon the contract by the plaintiff. It is our contention that the instrument in question, on its face, is a pledge, mortgage and security. This will be argued at length hereafter.

**SECOND: That the Southern Pacific Company was a Bona Fide Purchaser.**

This defense was not urged in the court below and I trust will not be urged here. The evidence was overwhelming and undisputed that all of the leading officers of the Southern Pacific Company were fully advised of all the terms of the contract and the relations of Graham to the property. In fact, the contract was drawn at the suggestion of Mr. Collis P. Huntington, so that the Southern Pacific Company might advance the money to make the purchase. Harriman, president of the Southern Pacific Company, knew all the details of the controversy, and was informed of all the provisions of the contract of June 8, 1899, and Graham's claims to the ownership of the property thereafter, and negotiated for its purchase with Graham (Tr. pp. 376-377). Furthermore, at the time of the purchase by the Southern Pacific Company there was pending undismissed the receivership suit by Spreckels & Co. against the Coos Bay Railway and R. A. Graham, seting forth most of the elements of Graham's claims. This was not dismissed until 1907. The sale to the Southern Pacific Company was on July 2, 1906 (Tr. p. 367). The original judgment roll in this action was forwarded as an original exhibit.

**THIRD: Bar of the Statute of Limitations.**

The answers plead many provisions of the statutes of limitations of Oregon and California. The only statute attempted to be urged in the court below was that of the State of Oregon. It was, however, admitted in the court below that The J. D. Spreckels & Brothers Company had never filed its articles of incorporation in the State of Oregon and had never appointed a managing agent therein and had never submitted itself to the jurisdiction of the State of Oregon. This admission was made to avoid the necessity of documentary proof (Tr. pp. 386, 387 and 405).

It is settled law that a foreign corporation cannot plead the Statute of Limitations of a state unless it establishes the fact that it has complied with all the laws of that state by filing its articles of incorporation, appointing a managing agent in conformity thereto and has submitted itself to the jurisdiction.

Until it has thus complied, the privileges of the statute are withheld from it.

*Taylor v. Union Pacific,* 123 Fed. 155.

The defense of the Statute of Limitations was not urged on the argument in the court below and I trust will not be here.

**FOURTH: Estoppel by Stipulation Filed in a Former Action.**

It is alleged that in an action brought in the Circuit Court of the United States for the District of Oregon, by the J. D. Spreckels & Brothers Com-

pany against the Coos Bay, etc. Railroad, R. A. Graham and the other directors of that corporation, there was a stipulation signed and filed by the plaintiff, Graham, that his answer therein might be withdrawn and the complainant might have judgment as prayed for in the complaint, except in certain particulars (see said stipulation, Tr. pp. 103-104).

This stipulation was never followed up to judgment against Graham but, on the contrary, the plaintiff expressly refrained from taking judgment and dismissed the action entirely (see the judgment on pp. 107-108, Tr., pleaded in defendant's answer).

Under these circumstances it was held by his Honor, Judge Bean, on a demurrer to the answers pleading this estoppel, in the court below, that such plea in estoppel was not good because—

> "There is no averment that any decree was ever entered in the suit brought by Spreckels & Brothers Company against the railroad and Graham in this court or that the stipulation signed by Graham was ever acted upon by either party and therefore such proceeding could not have the effect of an adjudication that the title to the stock was in Spreckels & Brothers Company or estop Graham from contesting that position" (Tr. p. 13, Judge Bean's decision).

Again, in an action brought by the Farmers Loan & Trust Company to foreclose the bonds against the Coos Bay etc. Railroad Company and Graham, the plaintiff, Graham, intervened, and subsequently, under an agreement for settlement, signed a stipula-

tion consenting to the withdrawing of his petition for intervention (Tr. pp. 360, 361 and 362). But no judgment was entered against Graham in this matter and the action was merely dismissed by the plaintiff on the consent of the Southern Pacific Company (Tr. p. 363). These stipulations were entered into under an agreement of settlement (see statement of Mr. McNab, Tr. pp. 360-362).

Moreover, the stipulation was signed by Mr. Graham under the distinct promise that they would enable J. D. Spreckels & Brothers Company to dispose of the pending litigation to the end that the properties might be sold and Graham should receive his money, as well as Spreckels be paid what was justly due him (see Graham's testimony, Tr. pp. 370-371-372-373-374 and 379, undisputed). These stipulations were sent out to A. B. Spreckels and it was duly believed by Mr. Graham that it would lead to the final settlement of the controversy existing between them. However, after securing the stipulations and clearing the records of the suits, the J. D. Spreckels & Brothers Company, as they had done on two former occasions, violated all their promises and engagements and sold the property outright to the Southern Pacific Company without further regard for any of the plaintiff, Graham's, rights thereto (Tr. p. 380).

**FIFTH: That Plaintiff Graham has been Guilty of Laches.**

The sale by the J. D. Spreckels & Brothers Company took place July 2, 1906 (Tr. p. 4). This action

was brought December 2, 1907,—about six months after the sale. On the demurrer it was held by his Honor, Judge Bean, that the action was brought in time and was not barred by the Statute of Limitations (Tr. p. 13), but plaintiff, not only by his complaint (Tr. pp. 42-44) and by his testimony (Tr. p. 383), but by the testimony of Attorney Wood, formerly opposing him (Tr. p. 675), showed a constant assertion of rights by litigation. As will be shown by the original judgment rolls in the actions of J. D. Spreckels & Brothers Company v. the Coos Bay Railroad, judgment roll No. 2933, and Farmers' Loan & Trust Company v. Coos Bay Railroad Company and others, judgment roll No. 2934, the plaintiff Graham was asserting his rights by answers and by intervention, and during all of these times was carrying on negotiations under promises by the J. D. Spreckels & Brothers Company and its representatives, to settle the litigation (see Graham's testimony, Tr. pp. 369 to 384).

Mr. Graham testified (Tr. p. 383):

> "After I commenced this action I have been ready and anxious to proceed to trial. My attorneys were E. B. Watson and Watson & Beekman. So far as I know there has been no delay in this action due to any action on my part. I have never asked for any postponements."

Graham was constantly in court demanding that his case be tried, and it was the defendants who were seeking postponements. Mr. Graham's lawyer died, leaving no one familiar with the mass of

detail in the case; but he retained new attorneys and insisted on driving the case to trial. All the years from the time that the properties were delivered to the J. D. Spreckels & Brothers Company, Mr. Graham has been litigating this question and endeavoring to get it determined in various actions.

Mr. Wood, attorney for J. D. Spreckels & Brothers Company, testified:

> "My memory would be that during this time Mr. Graham never ceased asserting his claim against the J. D. Spreckels & Brothers Company relative to an asserted ownership in the Coos Bay stock and bonds."

**SIXTH: That Graham Signed a Release of Demands Against Spreckels.**

During the trial there was introduced in evidence a release which had been signed by R. A. Graham and *dated June 8, 1899,* running to J. D. Spreckels & Brothers Company. It is contended by the parties that this release is a bar to the maintenance of the action.

This release, as a matter of fact, was drawn as one of the large group of papers dated *June 8, 1899,* all of which depended for their vitality upon the carrying out of the agreement of *June 8, 1899.* Mr. Graham testified that this release was one of the many reciprocal releases executed by the parties and intended to be deposited with the Bank of California, there to be held contingent upon the payment or failure to pay the sum of $550,000 in

six months. There was some testimony offered by Spreckels, however, that this release was delivered between the parties. This was denied by Mr. Graham, who testified that the instrument never was intended to be omitted from the papers deposited with the bank and was not to have any effect except upon the contingencies provided in the agreement of June 8, 1899. There is no dispute that Mr. Graham so testified (see statement of counsel, Tr. p. 673, and testimony of R. A. Graham, Tr. p. 350).

At the time of the execution of the agreement of June 8, 1899, a large number of these reciprocal clauses were drawn and the particular language of some of them is to be noticed on pages 667 and 668 of the transcript, wherein they provide

> "this release and disclaimer not to take effect, however, except upon the failure of the undersigned to pay or cause to be paid to the Bank of California", etc.

Manifestly, this release could not and never was intended to take effect unless the whole escrow agreement of June 8, 1899, was consummated. Otherwise, there never would have been any purpose in drafting the agreement of June 8, 1899. That agreement, itself, provided in clauses "c" and "d" of paragraph 6 (see Tr. p. 50) for the execution of releases by Graham to Beaver Hill Coal Company, the Coos Bay Railroad Company, etc., all of said releases and disclaimers *"not to take effect, however, except upon the failure of the first party to pay or cause to be paid to said trustee, for the use and*

*benefit of the second party, said sum of $550,000".* Manifestly, any additional release would have been without consideration and if, by any accident, said release escaped from the great mass of papers and found its way into the possession of J. D. Spreckels & Brothers Company, it amounts to nothing. Graham testified that he never received anything for such release or any other release and never delivered it and that it was a part of the general plan by which all papers were to be deposited in escrow with the Bank of California.

**SEVENTH: Estoppel by Admission in Former Answer of R. A. Graham.**

In an action commenced in the Circuit Court of the United States (Judgment Roll No. 2933) by J. D. Spreckels & Brothers Company against the Coos Bay Railroad Company, Graham and others, the plaintiff, Graham, filed an answer through his attorneys, Eidelman & Mitchell. For some reason never understood by Mr. Graham or even known to him until called to his attention by Mr. McNab, in October preceding the trial, this answer contained a statement asserting the positive claim to all of the bonds of the Coos Bay Railroad but admitted that the complainant, Spreckels, owned the twenty thousand shares of stock.

The plaintiff, Graham, testified (Tr. p. 357):

> "Mr. C. M. Idleman and Senator Mitchell were my attorneys in that suit at the time this answer was filed and verified by me. I did not understand it contained a statement admitting

that the complainant owned twenty thousand shares of stock in the Coos Bay etc. Railroad. I did not discover that such an admission was in this answer until Mr. McNab told me last year—in the summer of last year—October. My attention was also called that in the same paragraph *I denied that they were the owner of any of the bonds of the railroad.* I did not know that it was in at the time I signed it and read over its provisions with Senator Mitchell. *At that time I was making claim to the ownership of all the stock as well as all the bonds of the railroad. That was my understanding and intentions. If I had known any such provision was in there I would not have signed nor verified it. In the signing of that answer I had no knowledge concerning any admission there as to the ownership of stock being in Spreckels in the same paragraph in which it is alleged that I am owner of all the bonds; and I never saw it or noticed it.* I would never have signed any such admission or pleading had I known it was there. I certainly wouldn't have signed it. I had no knowledge as to how it got there and I didn't know it was there until Mr. McNab drew my attention to it. *At that time I thought I was asserting my claim to the stock of the railroad as well as its bonds. I was doing it in every way that I could. I had never any other idea but what I owned the stock and the bonds subject to this claim; and why it was put in I have no knowledge. I mean subject to the $550,000 claim set forth in the agreement."*

Manifestly, the allegation in the answer was due to a mistake of the attorneys. In any event it caused no injury and is not a ground of estoppel because under those stipulations made under a

promise of settlement the answer was withdrawn (Tr. p. 437), and no judgment was taken, but the action was dismissed (Tr. pp. 364-366).

At most, it would be an admission of a conclusion of law which conclusion was erroneous, for Graham was the owner of the stock and still is.

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### THE DEFENSE THAT GRAHAM RECEIVED RELEASES FROM THE BANK OF CALIFORNIA.

The defendants in the case below produced a receipt purporting to be signed by Mr. Graham to the Bank of California for the delivery to him of certain instruments referred to in the contract of June 8, 1899. The facts are as follows:

Mr. Graham having informed the Bank of California by mail from New York not to deliver the papers to Spreckels at the end of the six months period (Tr. p. 347) came on to San Francisco. On arriving in San Francisco he learned from some source that The Spreckels Company had caused the Coos Bay Railway Company to sue him or was about to sue him, for certain sums of money. Mr. Graham submitted the matter to Judge Garber, his attorney, saying that he could not understand why The Spreckels Company should be claiming that they were acting under the contract of June 8, 1899, and were receiving his properties thereunder and at the same time be maintaining actions against him on behalf of the Coos Bay Railway Company.

And he called to Judge Garber's attention the fact that under the contract of June 8, 1899, there was to be delivered to him a release by the Coos Bay Railway Company of all demands.

Judge Garber told Mr. Graham that he must be quite mistaken and that there certainly could not be any litigation of that character. His office was above the Bank of California and he said to Mr. Graham "You go down to the bank and see the papers or get them" (Tr. p. 351). Graham went to the bank and asked to see the papers. The bank officials asked him to sign a receipt before he took the papers, and believing that it was merely a receipt for the papers which he intended to return, he signed it. The bank official then produced the papers but it did not contain the release required to be delivered over to him by the Coos Bay Railroad (Tr. p. 351). Graham then refused to accept any of the papers and handed everything back, but the receipt on the margin of the book was never wiped out (Tr. p. 352). Graham testified:

> "I never received the satisfaction of the judgment for the $523,000 and odd dollars. I never received anything of value or otherwise from the Bank of California or from Spreckels in regard to this agreement; not one scrap of anything" (Tr. p. 352; see also page 433).

The summary of Graham's testimony with relation to the signing of the receipt and the failure by the Bank of California to deliver the papers claimed for it, is to be found at pages 349 to 353, inclusive, of the transcript.

The only evidence to the effect that Mr. Graham ever received any of these papers is to be found in the deposition of Moulton and the testimony of Daniels of the Bank of California to the effect that this receipt is among their files, but all other records were destroyed. The bank was unable to give any testimony beyond the production of the receipt to the effect that the papers had been delivered to Graham. This was met by Graham's positive denial that he had ever received them and a clear explanation of how the receipt happened to be signed under the circumstances just above mentioned.

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### IN CONCLUSION ON THE FACTS.

We invite a reading by the Court of Graham's concluding testimony, pages 471 et seq. To show the effect of Spreckels' successive acts, I quote the following simple testimony:

> "From the time that I received the letter signed by John D. Spreckels in which he told me that if I had thrown myself upon his mercy and had surrendered to him all my properties, he might have been disposed to deal with me more leniently, I did not do anything to provoke that firm in any way into the actions which they took against me; if I did so unconsciously, I did not know it. *I have never received one dollar for all the years that I put in the Coos Bay Railway.* Other than the salary of $150 a month that I received while I was there as its manager, plus what they paid on this insurance policy. I have no recollection of ever receiving a cent from the Beaver Hill Coal Company but

that the $150 a month I received as manager went towards keeping my wife and us, but it was not near sufficient to pay our living expenses. To make out for living expenses my wife kept boarders."

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## Argument.

**THE CONTRACT OF JUNE 8, 1899, IS NOT A CONDITIONAL SALE BUT IS AN INSTRUMENT BY WAY OF MORTGAGE, PLEDGE OR SECURITY. BY IT R. A. GRAHAM DID NOT EXTINGUISH HIS EQUITY OF REDEMPTION. IT RETAINED ALL THE DISTINCTIVE FEATURES OF A MORTGAGE,—AMONG OTHERS, NAMELY, (a) CONTINUED EXISTENCE OF AN UNCANCELED DEBT DURING THE SIX MONTHS PERIOD, AND (b) RETENTION OF TITLE IN GRAHAM WHICH WAS NOT TO PASS UNTIL THE EXPIRATION OF A FUTURE PERIOD DURING WHICH THE DEBT CONTINUED. IT WAS AN ATTEMPT BY A CREDITOR TO EXTINGUISH BY A MERE EXECUTORY CONTRACT A DEBTOR'S EQUITY OF REDEMPTION.**

The agreement of June 8, 1899, shows upon its face that it was intended as a mortgage or pledge. By it Spreckels attempted to shut off an equity of redemption by a *mere executory contract*,—that is, by failure to make payment of a sum of money at a given time in the future, and that the indebtedness should continue to exist during the interim. Title was not to pass *until the expiration of the six months period and failure to pay.* No deed to Spreckels was delivered in escrow, but a conveyance was made to the bank and provision was made for passing of title *at the end of the*

*six months period* by the trustee. As a matter of fact this deed was not made by the Bank of California until several years had elapsed. It is settled law that an equity of redemption cannot be extinguished by an executory contract. In order to shut out the equity of redemption by an agreement subsequent to the creation of the original debt, there must be an executed contract by which (a) *the debt is instantly extinguished,* and (b) *title to all properties passes at once.*

Both on principle and authority, such an instrument could not extinguish Graham's right to redeem his properties. Nor did it pass title upon failure to make the future payment.

*Batty v. Snook,* 5 Mich. 231;

*Holden Land Co. v. Interstate Trading Co.,* 123 Pac. 733 (87 Kans. 221);

(This case is more nearly in point than any other adjudication in the United States and is decisive on every question of law and fact involved in the present case.)

*Jeffreys v. Hartell,* 51 S. W. 653;

*Johnson v. Prosperity Loan Co.,* 94 Ill. App. 261;

*Lewis v. Wells,* 85 Fed. 897;

*Marshall v. Russell,* 158 Pac. 141 (Advance Sheets, July 17, 1916).

It is of course a familiar and undisputed proposition that no force will be given to a stipulation in a mortgage or deed intended as a mortgage by which the mortgagor agrees that if he fails to make

payment by a stated time, the mortgagee shall become the absolute owner of the property.

It is equally well settled that no effect will be given to such an agreement made separately from the mortgage but at the same time (123 Pac. 736). But the decisions now go much further than this and it is a firmly established rule that an equity of redemption which a debtor holds in property which has been pledged or mortgaged as security for a debt *cannot be extinguished by any subsequent executory contract by which the equity of redemption is to be forfeited if the debt or sum is not paid on a future day stated in such contract.*

This principle was first announced with authority by the Supreme Court of Michigan in *Batty v. Snook,* 5 Mich. 231, wherein it is said:

> "Once a mortgage always a mortgage, may be regarded as a maxim of the court. Equity is jealous of all contracts between mortgagor and mortgagee by which the equity of redemption is to be shortened or cut off. The mortgagor may release the equity of redemption to the mortgagee for a good and valuable consideration, when done voluntarily, and there is no fraud and no undue influence brought to bear upon him for that purpose by the guardian. *But it cannot be done by a contemporaneous or subsequent executory contract by which the equity of redemption is to be forfeited if the mortgage debt is not paid on the day stated in such contract,* without an abandonment by the court of those equitable principles it has ever acted on in relieving against penalties and forfeitures."

The contract of June 8, 1899, required all of Graham's pledged securities, *as well as many other properties not theretofore pledged or mortgaged to Spreckels, to be delivered to the Bank of California.* (These are summarized on page 348 of the transcript and included 9,992 shares of railroad stock; the Klondyke spur railroad as well as the disputed Beaver Hill stock and insurance policy.) Graham was given the period of six months in which to pay the sum of $550,000, upon the payment of which he was to be permitted to draw down all of his properties. By the agreement, a then pending indebtedness amounting to $523,000, with accumulated interest, *was to be reduced to judgment and this indebtedness thus reduced to judgment was to be kept alive throughout the six months period.* It was only in case of failure on the part of Graham to pay the $550,000 within six months that title should *at a future time* pass. At the expiration of six months, in case Graham failed to pay, not only the properties which he had theretofore pledged and mortgaged to Spreckels *but also the new properties which he was then for the first time delivering* (Tr. p. 348), were to become forfeit to the creditor, Spreckels. The Court will therefore note that these two features, either one of which is sufficient, indubitably, to stamp the instrument with the character of a pledge or mortgage, were present, namely:

> *First. The continuance of the indebtedness throughout the entire period of time instead of its being extinguished on the signing of the instrument;* and

*Second. Title was not to pass to Spreckels on the making of the contract but only at a future time in consequence of Graham's failure to pay his debt.*

The clauses making clear these two elements are as follows:

"4. That a judgment shall be at once entered in the suit brought by the second party (Spreckels) against the first party (Graham) now pending in the said Superior Court of the City and County of San Francisco, State of California * * * in favor of the second party and against the first party for the sum of $523,162.52, together with interest thereon at the rate of six per cent per annum from the first day of April, 1898, both in United States gold coin, and providing for a sale of the pledged securities sought to be foreclosed in said suit, and with the usual provisions for the docketing of a judgment against the first party for any deficiency which may exist after the sale of the collaterals specified in the original complaint in said suit; that all proceedings to enforce said judgment be *stayed* for a period of six months after the date of this agreement."

(N. B. A satisfaction of said judgment was to be deposited *but only to take effect upon future contingencies.*)

"9. That if at any time within six months from the date of this agreement the first party shall pay or cause to be paid to the said trustee, for the use and benefit of the second party, the sum of $550,000 in gold coin of the United States, the title to all of the shares of stock, bonds, real property, and judgment below mentioned *shall thereupon vest in and the same shall become the absolute property of the first*

*party;* and said trustee is hereby authorized and directed to *thereupon* deliver to the first party and the second party hereby obligates itself to cause to be *thereupon* delivered to him'' the various properties.''

''10. Should the first party fail to pay or cause to be paid to the said trustee for the use and benefit of the second party, within said six months from the date hereof, the sum of $550,000 in gold coin of the United States, *the title to all the shares of stock, bonds, real property and judgment above mentioned shall at the expiration of said six months* vest in and the same shall become the absolute property of the second party; and said trustee is hereby authorized and directed to thereupon deliver to the party'' certain properties.

It will therefore be seen clearly that the debt was to be kept alive and not to be extinguished except by Graham's making payment. While, at the same time, it was provided that it was only ''at the expiration of said six months'' that title to the properties should vest.

An instrument containing very similar provisions is discussed with great learning in the case of *Johnson v. Prosperity L. & B. Association,* 94 Ill. App., page 260.

In this action, the complaint prayed that a warranty deed, together with a written contract, be decreed to constitute a mortgage and that plaintiff have the right to redeem. The deed in question was absolute on its face. The contract which accompanied the deed provided in its tenth clause as follows:

"It is expressly understood and agreed by the parties hereto that should said first party fail or refuse to pay to said party the said $250 * * * on or before two and one half years from the date hereof, *then the title to said premises, certificates of stock and profits in said association shall vest and become absolute in the second party and first party shall have no further right or interest in said premises and certificates of stock or anything arising or growing out therefrom.*

"Time is of the essence of this contract and of all the conditions thereof."

The Court, discussing the above quoted clause, say:

"The tenth clause, while not a formal condition of defeasance is nevertheless a limitation upon the effect of the deed as an absolute conveyance in that *it provides that it is upon the refusal or failure of appellant to make payment specified that the title 'shall vest and become absolute' in appellee.* An agreement to reconvey upon stipulated terms may suffice of itself to make a deed absolute in terms in effect a mortgage; *but a limitation which permits the absolute title to vest only upon the happening of the contingency of a failure to pay could hardly be considered to be other than a mortgage.*

* * * * * *

"Here the proviso in effect limits the vesting of absolute title to the happening of a future failure of appellant to make payment specified * * * aside from the other clauses and provisions of the contract * * * we regard this one proviso contained in the tenth clause as making the two sealed instruments taken together, a mortgage. * * * And although it be apparently the intent of the parties to thus

> make a mortgage which will cut off the right of the mortgagor to redeem, yet the courts hold that if it appeared to have been intended as a mortgage the right of redemption cannot thus be relinquished."

And commenting upon the fact that the evidences of indebtedness consisting of trust deeds and the like were retained to be canceled upon a future failure to pay, the Court say:

> "The very fact of this retention of the evidences of indebtedness and failure to *at once* cancel and deliver them up to appellant would afford strong proof that the instruments in question constitute a mortgage if such extrinsic evidence need be looked to for the purpose of determining their character."

And discussing the admissibility of evidence to determine the character of the instrument, the Court say:

> "While it is allowable to resort to extrinsic evidence to determine that a deed absolute on its face is in reality intended by the parties to be merly a mortgage, the converse does *not* obtain, namely, that resort may be had to extrinsic evidence to establish that a deed which is by its terms a mortgage is intended to operate as an absolute conveyance."

Discussing the words which have been so frequently held to be void as an attempt to shut off the equity of redemption, *Jones on Mortgages* says:

> "The usual words of the proviso are, that upon the payment of the debt or performance of the duty named 'then this deed shall be void', but any equivalent expression may be

> used; and in fact, if it appears from the whole instrument that it was intended as a security, although there be an express provision that upon the fulfillment of the condition the deed shall be void, it is a mortgage. The substance and not the form of expression is chiefly to be regarded."

In *Bearss v. Ford*, 108 Ill. 16, the Supreme Court said:

> "Nothing is more firmly established in the law of mortgages than that it is not competent for the parties even by express stipulation to cut off the right of redemption and to permit them to make such an instrument an absolute deed *upon some future contingency* would simply be cutting off the right of redemption which as we have just seen cannot be done."

In *Lewis v. Wells*, 85 Fed., page 896, George M. Mason became the owner of a certain note and mortgage imposed upon property standing in the name of W. M. Bennett. Bennett, the owner, made a deed to Mason, the mortgagee, for the property covered by Mason's mortgage and the parties caused the same to be placed in escrow with an agreement which directed the holder in escrow upon payment by Bennett of certain sums to deliver the deed over to Bennett and upon the payment of the value of the sum due the mortgagee, Mason, to cancel and satisfy the mortgage. It thereupon provided:

> "And you are further instructed that on the failure of said William M. Bennett to meet any of said payments at the times mentioned herein * * * that you deliver the enclosed

deed to the said George M. Mason (mortgagee)."

Bennett failed to make the last two payments mentioned and the deed was delivered to Mason who recorded it.

After discussing the questions of fraud and inadequacy of consideration and after holding that

> "To insist that what was in fact a mortgage was a deed is a fraud, in equity, and will not be tolerated."

the Court say:

> "Where any condition in writing, no matter how ingeniously worded, accompanies such a deed, it is not only good equity but the part of wisdom for the courts to hear any testimony which will tend to disclose the real facts attending the transaction. The escrow agreement accompanying the Bennett deed to Mason, and parol evidence, having been admitted in this case, let us examine the facts and see whether that deed was intended as a conveyance or as a security for a deed. * * * *The deed was not to be delivered for more than eight months after its execution and only then upon the condition that Bennett should fail to pay the amount secured by the mortgage.* Bennett before executing the deed and escrow agreement was advised by his attorney that it was in effect a mortgage only."

The Court examining the evidence holds that there was no meeting of minds, that while the mortgagee might have fully intended and artfully designed to exclude any equity of redemption, the mortgagor certainly did not believe he was parting

with absolute title and was advised that his action did not forfeit title. The Court relieved by holding it to be a mortgage.

It will be noted by the Court that when the contract of June 8, 1899, was ripe for signature, Graham insisted upon striking out all the provisions which provided that he should endorse any of his stocks or that title should pass by delivery of any of the instruments (Tr. p. 338). His purpose as stated by him was that he never intended to relinquish title and that he understood that the delivery of these instruments constituted nothing but a mortgage and he was so advised by his attorney, Judge Garber (Tr. p. 339).

By long odds, the most exhaustive and authoritative decision anywhere to be found on the question here involved is that of *Holden Land & Livestock Co. v. Interstate Trading Co.,* 123 Pac., page 734.

Seldom is a series of complicated facts, such as present themselves in this cause, duplicated in another decision. However, in the case just cited, we have a set of facts almost identical with those involved in the case before this Court. There, the papers, instruments and securities which had been the subject of contractual relations between the parties were delivered in escrow and as in the case at bar a given length of time was agreed upon within which the debtor might pay a stipulated sum and upon such payment withdraw his securities and property. It was likewise provided, as in the case

before this Court, that upon the failure at a certain stipulated time in the future, to make the agreed payment, the title to the various securities and properties should *thereupon* become vested in the creditor and the debtor's right thereto should cease.

In all respects, therefore, the decision in question is in line with the facts of the present case. The Supreme Court of Kansas has exhaustively covered the law on the question. The opinion is that of the unanimous Court and in the humble opinion of the writer of this brief is the most exhaustive and authoritative interpretation of contracts which attempt to wipe out by any form of agreement the sacred and solemn right of a debtor to preserve his right to redeem his properties from the grasp of his creditor.

To the careful reading of this most extended opinion, we most earnestly invite the attention of the Court.

By the contract it was recited that the various counter-indebtednesses, instruments, bills of sale, notes, mortgages, etc., should be delivered into the hands of a third party and it is thereupon recited:

> "The provision was made that if Holden's notes were paid by July 9, 1904, Patton (escrow agent) should deliver to Holden the notes, the collateral and the deeds; if the notes were not paid on that date Patton should deliver the bill of sale and the deeds to the Trading Company, deliver the Trading Company's note to the bank and surrender Holden's note to

Holden. * * * Final delivery was made as directed in the event the notes were not paid by the date fixed."

We quote from the decision as follows:

"What it in substance amounts to is this: Holden, the mortgagor, and the bank, the mortgagee, agree that Holden is to have until July 9th to pay his debt. If he fails to do so, he is to relinquish all claims to the land and the bank is to become the owner. The Trading Company's function is merely to provide a method for carrying the property in the guise of commercial paper if the bank should become its owner. The deposit of the instruments in escrow does not affect the character of the transaction. It is but a device to insure performance. The important question is, what rights did the law give the parties under this arrangement, rather than, what did they conceive their rights to be?

(1) It is a familiar and undisputed proposition that no force will be given to a stipulation in a mortgage (or in a deed intended as a mortgage) by which the mortgagor agrees that, if he fails to make payment by a stated time, the mortgagee shall become the absolute owner of the property. 27 Cyc. 1098. It is equally well settled that no effect will be given to such an agreement made separately from the mortgage, but at the same time. 11 A. & E. Encyl. of L. 243.

(2) This principle renders ineffectual the deposit of a deed in escrow by the mortgagor at the time he gives the mortgage for delivery to the mortgagee if he fails to meet his obligation promptly; otherwise the rule could be readily evaded. Plummer v. Ilse, 41 Wash. 5, 82 Pac. 1009, 111 Am. St. Rep. 997, and note to same in 2 L. R. A. (N. S.) 628.

It is often said that after the execution of a mortage the mortgagor may release to the mortgagee his 'equity of redemption'—using the term to denote his right to redeem after his default, or more properly, his actual title to the property, not referring to the statutory *right to redeem* after a sale on foreclosure. 11 A. & E. Encyl. of L. 243; note, 55 Am. St. Rep. 105; 3 Pomeroy's Equity Jurisprudence, Sec. 1193, note 1, p. 2371; 2 Jones on Mortgages, Sec. 1045. What is meant, however, as is shown by an examination of the cases cited in support of such statements, is merely that the mortgagor may at any time after the execution of the mortgage sell to the mortgagee outright all his interest in the property, by a conveyance operating at once, and in that sense release his right to redeem. But he cannot, even after the mortgage has been made, bind himself by an agreement that, if he does not pay his debt by a certain time in the future, he will forfeit all right to the property. The recognition of such a right in a few cases, of which Bradbury v. Davenport, 120 Cal. 152, 52 Pac. 301, is an example, seems to result from a failure to note the distinction referred to. Considerations of public policy forbid the enforcement of a contract, made by the borrower at the inception of his loan, that he will forfeit his interest in the property he offers as security if he fails to meet his obligation promptly. The same considerations apply with equal force where he makes a like contract upon a renewal of the loan or an extention of the time of its payment. To hold otherwise would be to deprive of the benefits of the rule those most in need of its protection. If at any time after the execution of a mortgage the mortgagee could, by an extension of time or upon any other new consideration, obtain from the mortgagor a valid agreement that if he did not pay the debt in full

by a certain date he should forfeit the entire security, then virtually the ancient common-law mortgage would be still in vogue, its rigors unrelieved by any equity of redemption. The modern tendency is to extend, rather than to contract, the scope of equitable relief against forfeitures.

"There is no principle in equity better settled than that every contract for the security of a debt, by the conveyance of real estate, is a mortgage; and all agreements of the parties tending to alter, in any subsequent event, the original nature of the mortgage, and prevent the equity of redemption, is void. If the conveyance, or assignment, was a mortgage in the beginning, the right of redemption is an inseparable incident, and cannot be restrained or clogged by agreement." Henry v. Davis, 7 Johns. Ch. (N. Y.) 40, 42.

"The maxim, once a mortgage always a mortgage, does not cease to be applicable on the execution of the instrument, and will, on the contrary, invalidate a subsequent agreement tending to preclude the exercise of the right of redemption." Leading Cases in Equity, White & Tudor. p. 1980, note.

"Once a mortgage always a mortgage, may be regarded as a maxim of the court. Equity is jealous of all contracts between mortgagor and mortgagee, by which the equity of redemption is to be shortened or cut off. The mortgagor may release the equity of redemption to the mortgagee for a good and valuable consideration, when done voluntarily, and there is no fraud and no undue influence brought to bear upon him by the creditor. But it cannot be done by a contemporaneous or subsequent executory contract by which the equity of redemption is to be forfeited if the mortgage debt is not paid on the day stated in such

contract, without an abandonment by the court of those equitable principles it has ever acted on in relieving against penalties and forfeitures." Batty v. Snook, 5 Mich. 231, 239, 240.

"Where land is conveyed to another by deed, absolute on its face, but to secure the payment of money, and the grantee gives the debtor a written agreement to convey the land on payment of the debt, the conveyance will be a mortgage only, and its character will not be changed by giving a new note and taking a new agreement to convey in which time is made the essence of the contract, and which provides that, in case of failure to pay on the day named, 'the intervention of equity' shall be forever barred —the relation of mortgagor and mortgagee will still exist." Tennery v. Nicholson, 87 Ill. 464, syllabus.

"A valuable article upon 'The Clog on the Equity of Redemption', in 21 Harvard Law Review, 459, 466, cites Wynkoop v. Cowing, 21 Ill. 570, as holding that an executory contract for the release of the equity of redemption may be held valid if made subsequently to the mortgage. The court there decided that the original transaction was a sale and not a mortgage, and what was said as to the release of the equity of redemption was avowedly dictum. The precise point here under discussion was not discussed.

"(3) If the deeds to the Trading Company are conceived as taking effect at the time of their deposit in escrow, or at the time of their first delivery to the Trading Company, then they amounted to mortgages under the usual test—the continued existence of the indebtedness. McNamara v. Culver, 22 Kan. 661; 1 Jones on Mortgages (6th Ed.) Secs. 264, 265; 27 Cyc. 1010. If the parties by the plan outlined in the first contract intended to carry

out an arrangement the legal effect of which would be to pass the title to the land, leaving Holden only a right for its re-purchase, they are shown by the second contract not to have consummated their purpose, but to have voluntarily abandoned that course and adopted one of a radically different nature, which made the deed, which had been signed and acknowledged, but not finally delivered, in effect a mortgage. The second contract distinctly recognizes the notes as subsisting obligations of Holden, and the loss of his title to the land is made to turn upon whether or not they are paid by a certain date. This feature is more noticeable because the first contract professed to show that the indebtedness had been extinguished. It is true that the notes were to be returned to Holden at the end of the period fixed, whether they were paid or not, and in the meantime they were in the hands of a third party, so that he was well protected against the enforcement of a personal liability upon them. But the fact remains that they were not to be returned to him until the expiration of the time named, and in the meanwhile he was not entitled to them. The existence or non-existence of an indebtedness is of importance in determining whether a transaction is a sale or a mortgage because it interprets and gives character to the language and conduct of the parties. The practical likelihood of the debtor being called on to respond to a personal liability is not an element in the determination of the matter. It is not material to inquire what purpose of the bank was subserved by the continued existence of the notes. It is enough that they were for some reason kept alive, and Holden remained a debtor to the bank. In November, 1904, Patton offered to deliver the notes to Holden, but he refused them. In February, 1906, the assistant cashier of the bank deliv-

> ered them to him. The note of the Holden Company was never returned."

It will be noted in the agreement of June 8, 1899, that the papers were not strictly speaking delivered in escrow to the Bank of California—that is to say, no deed was executed by Spreckels to Graham. By paragraph six of the agreement of June 8, 1899, it is provided:

> "That the first and second parties shall jointly execute and deliver to said trustee a deed to the following described property situate in the town of Marshfield."

And it is provided further in subdivision "C", paragraph 9, that if Graham shall pay the money within six months

> "The second party hereby obligates itself to cause to be delivered to him * * * a good and sufficient deed of conveyance executed by said trustee to the first party of the above described real property."

Therefore, no contention can be made that title passed at the date of the agreement of June 8, 1899. On the contrary, the instrument explicitly provides that title shall pass only "at the expiration of said six months". As if specifically to avoid any question of title passing at the time, the makers of the contract distinctly declare that title shall not pass until the failure to make payment at a definite time in the future.

Likewise, the contract provides for the reduction of Graham's indebtedness, then under contest in

Court, to an agreed judgment, and this judgment was to be kept alive and was only to be extinguished by a satisfaction in case Graham paid. (Graham never received this satisfaction of judgment. See his testimony (Tr. p. 352) but it is immaterial whether he did receive it under the circumstances.)

Upon these subjects the above cited decision from the Supreme Court of Kansas is decisive:

> "The second contract distinctly recognizes the notes as subsisting obligations of Holden and the loss of his title to the land is made to turn up whether or not they are paid *by a certain date.* * * * It is true that the notes were to be returned to Holden at the end of the period fixed, whether they were paid or not and in the meantime they were in the hands of a third party so that he was well protected against the enforcement of a personal liability upon them. But the fact remains that they were not to be returned to him until the expiration of the time named and in the meantime he was not entitled to them."

And discussing the element of a continued indebtedness and dismissing the lack of practical danger against the enforcement of the indebtedness, the Court say:

> "The existence or non-existence of an indebtedness is of importance in determining whether a transaction is a sale or a mortgage because it interprets and gives character to the language and conduct of the parties. The practical likelihood of the debtor being called on to respond to a personal liability is not an element in the determination of the matter.

> It is not material to inquire what purpose of the bank was subserved by the continued existence of the notes. It is enough that they were for some reason kept alive, and Holden remained a debtor to the bank."

The opinion then recites the delivery by the escrow holder of the evidences of indebtedness back to Holden but holds this circumstance immaterial.

These facts are directly analagous to the case at bar. The indebtedness was kept alive and carefully preserved. The title was distinctly reserved in Graham until the expiration of a given period.

In *Marshall v. Russell,* 158 Pac. (Advance Sheets, July 17, 1916) the Supreme Court of Colorado reaffirms the doctrine advanced in *Livestock Co. v. The Trading Co.,* supra, and it is there said:

> "The fact that the escrow agreement states that in the event of nonpayment, etc., the instrument shall become absolute, does not change the rule. It is a familiar and undisputed proposition that no force will be given to a stipulation in a mortgage or in a deed intended as a mortgage, or in any instrument executed at the same time, accompanying such deed, by which the mortgagor agrees that if he fails to make payment by a stated time, the mortgagee shall become the absolute owner of the property."

It is, of course, in this case, too plain for discussion that Spreckels was seeking to wipe out an equity of redemption by making a mere executory contract to be or not to be performed in the

future. This the law abhors and equity will not permit.

The decision in *Holden Land Company v. Interstate Trading Company,* supra, is the only case in America passing on facts identical with those in the case now before the Court. The principle upon which that decision is founded, however, has been variously illustrated. Thus in *Plummer v. Ilse* (Wash.), 82 Pac. 1009, reported with notes in 2 L. R. A. (N. S.), page 627, the parties endeavored by an ingenious arrangement to circumvent the rule forbidding the extinguishment of the equity of redemption. A deed absolute in form was placed in escrow to be delivered to the mortgagee on default in the payment of the mortgage debt in the future. As said by the editor of the Lawyers' Reports Annotated,

> "The arrangement * * * was well adapted to the carrying out of the purpose to cut off the mortgagor's equity of redemption in the event mentioned if that result could be accomplished by any arrangement contemporaneous with the giving of the mortgage."

The decision, therefore, which denies the deed, even after its delivery by the depositary to the mortgagee, the character of an absolute conveyance, and regards it as still the mortgage, must rest upon the restriction imposed by equity upon the freedom of contracting with respect to the equity of redemption.

In the decision the Court say:

> "In deciding whether it was a mortgage, the principal test to be applied is whether the relation of the parties towards each other of debtor and creditor continued after the execution of the deed."

If the above test is determinative of the question, then this case need proceed no further, because the parties expressly kept the indebtedness alive and the relation of debtor and creditor continued to exist.

And discussing the intention of the parties, the Court further says:

> "On the other hand, if the transaction of the parties actually constitutes a mortgage in terms, it will have that effect though not so intended by them when it was done * * *."

When The Spreckels Company provided, by the agreement of June 8, 1899, that the indebtedness of Graham on the promissory note of $523,000 should be forthwith reduced to a judgment and a decree containing all of the usual clauses providing for sale of securities, execution of transfers and the like, it was taking all the means within its power to preserve the integrity of its indebtedness during the period in question.

The only way in which that indebtedness could have been extinguished was by the delivery of a receipt and acquittance *forthwith*. To reduce the indebtedness to a judgment was to reaffirm its claim to the repayment of the debt in the most

emphatic fashion known to the law. The mere fact that a satisfaction of the judgment thus secured was executed is wholly immaterial because the satisfaction was not effective but was held during the period of escrow and was to be contingent in its delivery upon the doing of certain things in the future. The satisfaction had no potency. That contingency might never occur. Until it should occur the satisfaction was as if it never had been written.

A creditor may deliver his promissory note to a bank together with a receipt in full for the amount of the indebtedness stated in the note, with instructions to the bank to deliver over the promissory note to the debtor at the end of six months if the debtor shall deposit the amount of money with the bank. *Can any one be found to say that the indebtedness evidenced by the promissory note is not existing during the period of time prior to the payment?*

The authorities are in harmony to the effect that the continued existence of the indebtedness in any form is held indelibly to stamp the transaction, whatever its nature, as a mortgage or pledge.

*Holden Land & Livestock Co. v. Interstate Trading Co.*, 123 Pac. 737;
*Hickox v. Lowe*, 10 Cal. 206-7;
*Montgomery v. Spect*, 55 Cal. 352;
*Plummer v. Ilse*, 82 Pac. 1010 (Wash.); 41 Wash. 5;

*McNamara v. Culver,* 22 Kan. 661-8;
*Bickel v. Wessinger,* 113 Pac. 37; 58 Ore. 6;
*27 Cyc.,* 1010.

We invite the special attention of the Court to the decision of *Montgomery v. Spect,* 55 Cal. 352. There an instrument strikingly similar to the one here involved was under discussion. A deed was delivered and simultaneously with it an agreement conditioned for the reconveyance of the property upon payment of the sum of $7,000. This was for an antecedent debt secured by mortgage. Holding it to be still a mortgage, the court say:

> "In such cases the central fact to be found is the existence of an indebtedness at the time of the transaction and a continuation of the relation of debtor and creditor. If that fact be found the inference deducible from it is that the debt was not made to transfer the title to land described in it, but was made for the purpose of securing the debt which the grantor owed to the grantee. * * * Spect gave no note or memorandum for the payment of the seven thousand and interest. Nor does the written agreement contain any promise by him to pay. But this circumstance does not make the conveyance less effectual as a mortgage if in fact there was a debt."

Again in *Hickox v. Lowe,* 10 Cal. 206, the Court say:

> "The consideration for the conveyance was a precedent debt upon the part of the grantor to Lowe, whose solution of the question under consideration depends upon the fact whether this debt was discharged by the conveyance or subsisted afterwards. If it continued after

> the execution of the conveyance, the instruments constitute a mortgage. * * * This is the true test by which to determine the character of transactions like the present."

Furthermore, the mere change from a note to a judgment, or the merger of the note into a judgment, creates no change in the relation between debtor and creditor. It is as much a debt when reduced to judgment as it was in its original form.

*Fisher v. Fisher,* 98 Mass. 303;
*Hills v. Flynn,* 140 or 146 N. Y. Supp. 508;
*King v. Hutchins,* 28 N. H. 561.

Nor can any force be attached to the fact that during the six months' period the promissory note was delivered into the hands of a third party. It is not material that the note or the personal obligation is surrendered or even canceled if in fact the debt remains unpaid.

*Marshall v. Thompson,* 39 N. W. 309; 139 Minn. 137;
*Holden v. Interstate Trading Co.,* 123 Pac. 733.

It may be contended that the agreement of June 8, 1899, contains no promise on the part of Graham to pay the $550,000 within the six months period. This does not affect its character as a mortgage. It is not necessary that the contract for the payment of the money should contain any promise on the part of the debtor to pay.

*Russell v. Southard,* 19 Wall. 73;
*Montgomery v. Spect,* 55 Cal. 352;
*Rempt v. Geyer,* 32 Atl. 266.

Nor is it necessary that there shall be any personal liability.

*Hickok v. Lowe,* 10 Cal. 197;
*Montgomery v. Spect,* 55 Cal. 352;
*Russell v. Southard,* 19 Wall. 73;
*Rempt v. Geyer,* 32 Atl. 266;
*Pioneer Gold Mining Co. v. Baker,* 23 Fed. 258.

The rule with regard to shutting off the equity of redemption is not affected by the fact that the deed of conveyance or other transfer of properties or securities is made to a third person as trustee.

*Marshall v. Thompson,* 39 Minn. 137; 39 N. W. 309;
*Robinson v. Willoughby,* 65 N. C. 520;
*McRobert v. Budget,* 149 S. W. 906;
*Holden Land Co. v. Interstate Trading Co.,* 123 Pac. 733; 87 Kan. 221.

As heretofore pointed out the parties joined in a deed to the Bank of California but no title whatsoever passed nor was any instrument executed purporting to pass title by Graham to Spreckels. The entire transfer so far as documents were concerned, was into the hands of a third party, and it was only long after the six months period that title was to pass to The Spreckels Company.

It is pointed out by the Supreme Court of the United States that where uncommon pains seem to have been taken to make the instrument a sale and not a mortgage, these very circumstances will be

considered in holding it to constitute in reality a pledge or mortgage, because equity will not suffer the debtor to be deprived of his equity of redemption.

*Russell v. Southard,* 19 Wall. 66.

Nor is it material to the legal situation that the debtor or creditor believe a conveyance was created by them. Acts done by the mortgagor in the belief that his right of redemption was gone will not prejudice him. If the instrument is a mortgage, it matters not what he believes or does while acting upon the assumption that it is something else than it really is.

*Villa v. Rodriguez,* 12 Wall. 339;
*Russell v. Southard,* 19 Wall. 67.

In all these cases a distinction is to be noted between an equity of redemption and a right of redemption.

An "equity of redemption", being the debtor's right to redeem after default, is to be distinguished from the mere statutory "right of redemption", after a sale by foreclosure. This distinction is clearly recognized by equity and explained in the following decisions:

*Holden Land Co. v. Interstate Trading Co.,* 123 Pac. 733;
*Meyer v. Farmers Bank,* 44 Iowa 212.

The right of redemption attaches to a pledge of personal property in the same way that it attaches to a mortgage of real property. Equity will not

permit the equity of redemption to be wiped out unless the pledge is disposed of by a foreclosure or by a sale according to statutory notice.

*Luckett v. Townsend,* 3 Tex. 119;
*Ritchie v. McMullen,* 79 Fed. 556;
*Collins v. Denny Clay Co.,* 82 Pac. 1012, (personal as well as real);
*Vickers v. Battershall,* 32 N. Y. Supp. 314;
*Golden v. Fischer,* 27 Cal. App. 272;
*Williamson v. Culpepper,* 16 Ala. 211;
*Clark v. Davis,* 2 Cowan (N. Y.) 324.

And wherever doubt exists as to whether an instrument constitutes a sale or a mortgage or pledge, that doubt must be resolved in holding the instrument to be an instrument of security and not of transfer.

*Ferris v. Wilcox,* 51 Mich. 105; 16 N. W. 252;
*Bickel v. Wessinger* (Ore.), 113 Pac. 25;
*Pioneer Gold Mining Co. v. Baker,* 23 Fed. 258.

It is contended by defendants in this action that the contract of June 8, 1899, constituted a conditional sale of the property. On the distinction between a conditional sale and a mortgage or pledge this whole action may be easily determined. Every element of the contract of June 8, 1899, is inconsistent with a sale, conditional or otherwise. A conditional sale *transfers title at the present moment,* with a conditional right to buy back. This is

directly contrary to the language of the present instrument.

Much weight is attached by the defendants to the opening paragraph of the contract reciting "that the parties hereto for the purpose of completely adjusting all matters of difference between themselves" entered into the contract. But the fact that they are attempting to completely adjust all matters between themselves only defines the attempt which they were then making to establish a basis upon which a settlement could be made. The mere recital of their desire to effectuate a complete settlement could not alter the fact that the agreement was made to depend upon contingencies which might or might not occur. A "complete settlement" may have been intended, but the machinery which they put in motion was not sufficient to effectuate that complete settlement. It would have been complete if it had been carried out by the payment of the money, but failure to pay the money could not deprive the debtor of his right to redeem his properties, some of which had never theretofore been under lien to the creditor (Tr. p. 348).

It is the law that where doubt exists whether an instrument shall be held to be a conditional sale or a mortgage or pledge, it must be held to be the latter.

*Hickok v. Lowe,* 10 Cal. 207;
*Russell v. Southard,* 19 Wall. 66;
*Pioneer Gold Mng. Co. v. Baker,* 23 Fed. 258;
*Luckett v. Townsend,* 3 Tex. 129.

The fact that time is to be of the essence of the contract is immaterial, for an equity of redemption cannot be shut off by any such provision.

*Tennery v. Nicholson*, 87 Ill. 465;
*Robinson v. Willoughby*, 65 N. C. 520;
*Pioneer Gold Mng. Co. v. Baker*, 23 Fed. 258;
*McRobert v. Budget*, 149 N. W. 906;
*Roy v. Patterson*, 87 S. E. 212;
*Holden Land Co. v. Interstate Trading Co.*, 123 Pac. 733; 87 Kan. 221.

The learned judge of the District Court in his opinion stated that there seemed to be a conflict between authorities as to whether an equity of redemption could be wiped out by a subsequent executory agreement, fairly entered into. He held that this right to wipe out the equity of redemption had been denied by certain Courts and cited *Holden v. Interstate T. Co.*, 123 Pac. 733, but said:

> "The courts of California, where the contract in suit was made and to be performed, recognized such right",

and cited the decision of *Bradbury v. Davenport*, 120 Cal. 152.

On two distinct questions, I take issue with the learned judge of the District Court, for whose opinion I hold the profoundest regard, namely:

*First.* The decision in *Bradbury v. Davenport* is not controlling on the merits against our position; and

*Second.* The fact that the contract was made in California does not make a decision of California controlling as to the construction of the contract.

This case twice reached the Supreme Court of the State of California. A demurrer having been sustained to its complaint, it is reported in *Bradbury v. Davenport,* 114 Cal. 596; that adjudication has become a legal authority throughout the United States on the proposition:

> "That the mortgagor is not allowed to renounce, before hand, his privilege of redemption; that while generally any one may renounce any privilege or surrender any right himself, an exception is made in favor of debtors who have mortgaged their property, for the reason that their necessities often drive them to make ruinous concessions; that when one borrows money upon the security of his property he is not allowed by any form of words to preclude him from redeeming it."

The Supreme Court having reversed the judgment on the pleadings, the matter again came to the Supreme Court on an appeal from a judgment on the facts, and is reported in *Bradbury v. Davenport,* 120 Cal. 152.

The question turned upon the construction to be applied to Sec. 2889 of the Civil Code of California. No question of oppression or of advantage of a creditor over a debtor was involved and the points which are urged in this action do not seem to have been pressed upon the attention of the Court. It was found by the Court that the transaction was in every way fair, honest and without fraud or un-

conscionable advantage, but it must be conceded that the Court, without discussing the question here involved, permitted the deed to stand on the ground that it was a fair transaction entered into between the creditor and the plaintiff's intestate, in full satisfaction of an indebtedness. But there the deed was delivered to the agent, and under the law of escrow, took effect by relation to its date. Here no deed was made or delivered, but the land was conveyed to the bank for future disposition by it. This is not an escrow. If the decision can be construed to recognize the right to wipe out an equity of redemption by an executory contract—and it is nowhere so held in the opinion—it is directly in the face of all authority throughout the United States. The principle is sufficiently and clearly determined in authorities of which *Plummer v. Ilse,* 82 Pac. 1010, and *Holden L. Co. v. Interstate Trading Co.,* 123 Pac. 737, are the highest expression.

It is not the law that a contract must be determined by the law of the state in which the contract was made. Law and jurisdiction are not confined to geographical limits. Whatever equity demands will be granted regardless of the place the contract was made, and the fact that the agreement was entered into between parties in California does not make a decision of the California Supreme Court controlling on the question.

*Rapple v. Dutton,* 226 Fed. 430.

THE CONTRACT OF JUNE 8, 1899, WAS EXECUTED AS THE CULMINATION OF OPPRESSIVE ACTS EXERCISED BY THE SPRECKELS COMPANY OVER THE PLAINTIFF, GRAHAM, AND UNDER CIRCUMSTANCES WHICH REQUIRE A COURT OF EQUITY, IN JUSTICE, TO DECLARE IT TO BE A MORTGAGE, PLEDGE OR SECURITY.

Aside from the face of the instrument, the circumstances under which its execution was brought about show that degree of oppression, duress and compulsion which equity abhors and under and by virtue of which equity invariably holds the instrument to be a mortgage. The very care with which the instrument seems to have been drawn in an attempt to defeat the equity of redemption, of itself offends equity and requires the destruction of the instrument as an attempt to destroy the equity of redemption.

Every element, in aggravated form, discussed in the numerous cases holding such agreements to be mortgages and not conditional sales is involved in the circumstances leading up to and surrounding the making of the contract in question.

*Villa v. Rodriguez,* 12 Wall. 339;
*Jones on Collateral Securities,* Sec 553;
*Russell v. Southard,* 19 Wall. 67;
*Montgomery v. Spect,* 55 Cal. 352;
*Collins v. Denny Clay Co.,* 82 Pac. 1012; 41 Wash. 673;
*Marshall v. Thompson,* 39 N. W. 309; 139 Minn. 137 (142);
*Bickel v. Wessinger,* 113 Pac. 37-8;

*Ritchie v. McMullen,* 79 Fed. 556;
*Lewis v. Wells,* 85 Fed. 898 (Oregon Law);
*Simpson v. First Nat'l Bank,* 93 Fed. 310;
*Grover v. Hawthorne,* 62 Or. 77;
*Pioneer Mining Co. v. Baker,* 23 Fed. 258;
*Feris v. Wilcox,* 61 Mich. 105; 16 N. E. 252;
*Rempt v. Geyer,* 32 Atl. 266;
*Mooney v. Byrne,* 57 N. E. 163; 41 Wash 5;
*Plummer v. Ilse,* 82 Pac. 1009;
*Jackson v. Lynch,* 129 Ill. 72;
*Robinson v. Willoughby,* 65 N. C. 520;
*Frodevoux v. Jordan,* 64 W. Va. 388; 62 S. E. 686;
*Roy v. Patterson,* 87 S. E. 212 (N. C.);
*Wilson v. Fisher,* 148 N. C. 535; 62 S. E. 662;
*Dickens et al. v. Simpson,* 174 S. W. 1154 (Ark.).

In *Villa v. Rodriguez,* 12 Wall. p. 339, the Supreme Court of the United States say:

> "The law upon the subject of the right to redeem where the mortgagor has conveyed to the mortgagee the equity of redemption, is well settled. It is characterized by a jealous and salutory policy. Principles almost as stern are applied as those which govern where a sale by a *cestui que trust* to his trustee is drawn in question. To give validity to such a sale by a mortgagor it must be shown that the conduct of the mortgagee was, in all things, fair and frank, and that he paid for the property what it was worth. He must hold out no delusive hopes; he must exercise no undue influence; he must take no advantage of the fears or poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. Every

> doubt will be resolved against him. Where confidential relations and the means of oppression exist, the scrutiny is severer than in cases of a different character. The form of the instruments employed is immaterial. That the mortgagor knowingly surrendered and never intended to reclaim is of no consequence. If there is vice in the transaction the law, while it will secure to the gortgagee his debt, with interest, will compel him to give back that which he has taken with unclean hands. Public policy, sound morals, and the protection due to those whose property is thus involved, require that such should be the law."

While under the first subdivision of this argument we are fortunate in having the support of the Supreme Court of Kansas on a case practically identical as to the contract, the plaintiff is equally fortunate in having a decision on the facts in *Collins v. Denny Clay Co.,* (Wash.) 82 Pac. 1012, in which Judge Rudkin wrote the opinion.

John Collins was indebted to the Denny Clay Co., and the indebtedness was secured by a pledge of assets of the value of $34,000. At the same time, he was also indebted to A. A. Denny. The Denny Clay Company commenced action against Collins for the recovery of the amount due and *for the foreclosure of the shares of stock given as a pledge to secure the same.* The Denny Clay Co. being about to take judgment, entered into an agreement reciting the commencement of the action against the debtor, Collins, for the purpose of foreclosing the pledge; that the first party, plaintiff, was about to take judgment, and provided that in considera-

tion of the dismissal of said action and a satisfaction of the claim sued on, the party of the second part, Collins,

> "Does hereby sell, assign, and set over unto the party of the first part, said stock as the absolute property of the party of the first part and as *a complete settlement of the indebtedness due by the party of the second part to the party of the first part upon said settled account sued upon.*"

The party of the first part was to dismiss the action and this provision follows:

> "It is further agreed that the party of the second part shall have the privilege of purchasing said stock from the party of the first part provided the party of the second part shall pay to the party of the first part on or before the fifteenth day of March next the sum of * * *
>
> In case the party of the second part shall fail to make either of said payments * * * that this right to purchase on the part of the second party shall be at an end."

The action was brought by the executors of Collins' estate to declare the above agreement to be a mortgage or pledge and to enforce the right to redemption and for an accounting. It will be noticed that the action is precisely similar to the one involved in the pending case.

We quote from the opinion of the Supreme Court of Washington rendered through Judge Rudkin, as follows:

> "The only remaining conclusion is the correctness of the finding or conclusion that the transaction in question was a mortgage or

pledge. This is a mixed question of law and fact, and both parties agree that whether a conveyance be a mortgage or a conditional sale must be determined by a consideration of the peculiar circumstances of each case. All the authorities agree that a mortgagor cannot, through any device, bargain away his right of redemption at the time of giving the mortgage. Bradbury v. Davenport, 114 Cal. 593; 46 Pac. 1062; 55 Am. St. Rep. 92; Plummer v. Ilse (just decided by this court) 82 Pac. 1009. While a mortgagor may release his equity of redemption to the mortgagee by a subsequent agreement, yet the courts view such agreements with distrust and disfavor, and, if it appear that the mortgagee has taken advantage of the necessities of the mortgagor, or that the consideration is grossly inadequate, the release will be disregarded and the original relation held to continue. Applying these rules in the case at bar, it appears that the relation of debtor and creditor existed between Collins and Denny and the Denny Clay Company at the time the agreement in question was entered into, and had so existed for some years before. Collins was insolvent, owing in all about $200,000. The total indebtedness included in the two notes was less than $8,000, and the total indebtedness actually released less than $3,500. The value of the property surrendered, as found by the court, exceeded $27,000, and the short period of four months was allowed an insolvent debtor to pay the indebtedness and reclaim the stock. We doubt if any authority can be found to sustain such a transaction."

The Court calls attention to the fact that the agreement (in language almost identical with that here involved) had stated the agreement to be "a complete settlement," and quoting from the Su-

preme Court of the United States in a somewhat similar case says:

> "In respect to the written memorandum it was clearly intended to manifest a conditional sale. Very uncommon pains are taken to do this. Indeed, so much anxiety is manifested on this point as to make it apparent that the draftsman considered he had a somewhat difficult task to perform. But it is not to be forgotten that the same language which truly describes a real sale may also be employed to cut off the right of redemption; that it is the duty of the court to watch vigilantly against these exercises of skill, lest they should be effectual to accomplish what equity forbids; and that in doubtful cases the court leans to the conclusions that the reality was a mortgage and not a sale."

The Supreme Court of the United States in *Russell v. Southard,* 12 How. 139, says:

> "It is true Russell must have given his assent to this form of the memorandum; but the distress for money under which he then was, places him in the same condition as other borrowers, in the numerous cases reported in the books, who have submitted to the dictation of the lender under the pressure of their wants; and a court of equity does not consider a consent thus obtained to be sufficient to fix the rights of the parties. Necessitous men, says the Lord Chancellor in Vernon v. Bethell, are not truly speaking, free men, but to answer a present emergency will submit to any terms that the creditor may impose upon them."

In *Bickel v. Wessinger,* (Ore.) 113 Pac. 37, it is said of a similar arrangement between debtor and creditor:

> "Equity regards the rights of a distressed debtor with almost guardian-like care and while it requires clear proof of a parol defeasance of a deed absolute in form, yet, when the defeasance clause is once shown, equity will go to the utmost in affording relief, and in cases of doubt between a mortgage and a conditional sale will *almost always* decide the question in favor of a mortgage."

And discussing the agreement, the court proceeds:

> "Was it an agreement to sell back the property or was it a mortgage? The test held by most authorities to be the controlling one in such cases in this: Was the preceding debt extinguished or was it continued? If it was extinguished the arrangement would only be at best a contract for the resale of the property, but, if the debt was continued, it is taken to be a mortgage."

In that case, the note was not completely surrendered, notwithstanding the sheriff's sale, and that circumstance alone was held to indelibly stamp the transaction as a mortgage. The Court proceeds:

> "The doctrine that, in cases of doubt between a contract for the resale of property and a mortgage, the latter will be upheld, is founded upon the wholesome and equitable reason that, if the transaction is determined to be an agreement for resale, it is so nominated in the bond that, unless by an apopinted time the former debtor pays, he loses all and the creditor gains all; but, on the contrary, if it is held to be a mortgage, equity will seize upon the property, convert it into money, returning to the creditor his own with interest and to the debtor the re-

> mainder, so that each is saved harmless as near as may be.
>
> We conclude that the transaction referred to is a mortgage."

In *Plummer v. Ilse,* (Wash.) 82 Pac. 1010, the agent for both parties, receiving the deed, signed a written instrument, reading in part as follows:

> "I hereby agree to hold the deed until the note and mortgage shall become due and past due, and *then* the deed shall be delivered to the mortgagee."

It was held that the parties could not by any stipulation wipe out the equity of redemption.

In *Ritchie v. McMullin,* 79 Fed. 556, the court considers an arrangement somewhat similar to the one here involved, wherein the debtor promised to take up the indebtedness within a certain period of time or forfeit title. The court say:

> "It is very clear to us that whatever the words of these contracts a court of equity would refuse, under the circumstances, to give either of them effect, as a sale of the stocks and bonds * * * A court of equity scrutinizes with great care the contracts made between pledgee and pledgor as to the transfer of title to the pledgee and does not hesitate to set aside such a contract if there is any ground for thinking that it is a harsh contract and one brought about by the position of vantage which the pledgee occupies with reference to the pledgor."

Citations may be multiplied without number. They can be found applicable to almost any state of facts and persuasive to the effect that all con-

tracts between debtor and creditor must be strictly scrutinized and considered with a view to save the debtor from the clutch of the creditor.

In the list of authorities set forth above, will be found many from which no quotation is here made, but any one of which might seem decisive of the facts in this case. Thus, in *Montgomery v. Spect,* 55 Cal. 353, an agreement entered into for a reconveyance of the mortgaged property, under circumstances closely akin to those involved here, was determined under careful review of the authorities to be of such nature that a court of equity must, in order to enforce the doctrines upon which that jurisprudence was founded, declare it to be a mortgage.

These features seem to stamp the transaction unquestionably as a mortgage.

Graham was indebted to The Spreckels Company in about the sum of $550,000. They had sued him for the foreclosure of certain securities and procured, by arrangement in this agreement, a decree by which they were permitted to sell under the statutory procedure of the state and recover a deficiency; the debt was kept alive because it was not wiped out by any instrument then effective or to be delivered until the end of the six months period; the provision for a repurchase of the property in case the six months obligation was paid cannot be held to be anything other than an extension of the mortgage.

This being a mortgage, therefore, and never having been foreclosed, The Spreckels Company is remitted to its remedy by foreclosure. Entitled to receive in the agreement only $550,000, The Spreckels Company, by fraud secured $1,300,000. The only possible deduction they could claim from this would be the value of the two small steamers, the Czarina and the Breakwater (Tr. p. 557). Having thus received over two and a half times the amount of the money due them, equity will not fail to insist upon an accounting, or, in this case, by virtue of the fact that the property was actually sold to the Southern Pacific Company with notice, to a judgment for the amount due.

The following are considered material inquiries in deciding whether the instrument is in fact a mortgage:

*First.* The financial condition of the debtor.

*Fisher v. Wilson,* 62 S. E. 662.

On this question the evidence, of course, is overwhelming that Graham was not merely on the brink of financial ruin, but had been driven to that point by the actions of The Spreckels Company.

*Second.* The value of the property as compared with the debt.

*Ferris v. Wilcox,* 16 N. W. 252;

*Simpson v. First National Bank,* 93 Fed. 309;

*Roy v. Patterson,* 87 S. E. 212.

On this question it is admitted that Spreckels sold the property for $1,300,000, and included in this there was no other property except the Czarina and the Breakwater, two boats which had cost Spreckels the sum of $125,000 (Tr. p. 557). Spreckels, himself, testified that he had only received a million dollars, but on cross-examination was confronted with his own sworn statement in another inquiry fixing the sum at $1,300,000 (Tr. p. 559). Graham's indebtedness amounted at the outside to $550,000, and this was a development of the original promissory note of $523,162, of which only $306.151 was actually advanced, the balance, amounting to $217,011 being made up of bonuses, commissions and interest. Therefore, out of $1,300,000 (or deducting the value of the boats which form the only foreign element, $1,150,000) the only moneys ever advanced by Spreckels amounted to $306,151.06 (see testimony, Treasurer Gibson, Tr. p. 630).

*Therefore, we have this astonishing fact, namely: That these properties of Mr. Graham's, earned by his industry, were actually sold by the Southern Pacific Company for over one million dollars more than the Spreckels Company had actually put into their venture.*

*Third.* The nearness to the amount of the debt or the disparity in amounts.

*Collins v. Denny Clay Co.*, 82 Pac. 1012;
*Rempt v. Geyer*, 32 Atl. 262;

*Fisher v. Wilson,* 16 N. W. 252;
*McNamara v. Culver,* 22 Canadian 461.

*Fourth.* Knowledge of the creditor as to the source from which the debtor was to secure the money to pay.

*Rempt v. Geyer,* 32 Atl. 266.

On this question, the evidence is absolutely without dispute, as set forth in the foregoing summary of facts, that Spreckels & Company knew that Graham was to receive the money from the Southern Pacific Company, and that Spreckels also deliberately and designedly persuaded the Southern Pacific Company not to advance the money but to allow Graham to fail in making the payment and that thereafter The Spreckels Company and the Southern Pacific Company would make an arrangement between themselves satisfactory to both (Tr. pp. 341-3).

In all the learning in the books, there is no case cited more extreme in the harshness with which the debtor was driven to the wall by a designing creditor than this:

That a debtor who himself was the creator of the wealth can be thus deprived of his property without accounting and without an opportunity to redeem is violative of the plainest equitable rules.

It is respectfully submitted that appellant is entitled to a reversal and to an order which will enable him to secure the restoration of his property on the payment of what is justly due or shall have a

judgment for the difference between the amount due to The Spreckels Company and the amount they actually received.

Dated, San Francisco,
January 29, 1917.

Respectfully submitted,

JOHN L. MCNAB,
*Attorney for Appellant.*

(APPENDIX FOLLOWS.)

# APPENDIX.

EXHIBIT "A."

This agreement, made this 8th day of June, 1899, by and between R. A. Graham, party of the first part, and J. D. Spreckels & Brothers Company, a corporation, party of the second part, Witnesseth:

That the parties hereto, for the purpose of completely adjusting all matters of difference between themselves, and between each of them and the Beaver Hill Coal Company, a corporation, and the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, a corporation, do hereby agree as follows:

1. That the receivership suit brought by the first party against said Beaver Hill Coal Company, and now pending in the Circuit Court of the United States for the District of Oregon, shall at once be dismissed upon the settlement of the account of W. W. Catlin, receiver of said Company, each party to said suit to bear his own costs; that an order be at once made in said suit directing said receiver to render an account to said Court, and that upon the settlement of said account an order be made removing said receiver; that all proper fees, costs and charges of said receiver and of J. B. Hassett, the former receiver, and all proper certificates issued by said Hassett and said Catlin as said receivers be paid as far as possible out of the funds in the hands of said Catlin, as said receiver when the

same are allowed by the said Court; that said receiver shall surrender the possession and custody of all the property of said Beaver Hill Coal Company unto said company; that said company shall remain in the possession of all its said property during the life of this agreement, without interference in any manner by the first party; that the second party will cause proper steps to be taken by the Beaver Hill Coal Company, so long as it controls the same, for the care and preservation of said property during the life of this agreement; and that the moneys received by said company after the removal of said receiver shall be applied towards the payment of the balance, if any, remaining due for said fees, costs and charges of said Hassett and Catlin, as said receivers, and on said certificates of said receivers, and also towards the payment of all proper expense incurred in the care and preservation of the property of said company after the removal of said Catlin, as said receiver, and during the life of this agreement.

2. That the suit brought by said Beaver Hill Coal Company against the first party for an accounting, now pending in the Superior Court of the City and County of San Francisco, State of California, shall be at once dismissed, each party thereto to bear his own costs; and that there shall be delivered to the first party, upon the signing of this agreement, a release executed by said Beaver Hill Coal Company, releasing and discharging the first party of and from any and all claims and de-

mands which it may now have or claim to have against him.

3. That the receivership suit brought by the second party against the Coos Bay, Roseburg & Eastern Railroad & Navigation Company now pending in said Court of the United States, for the District of Oregon, shall be at once dismissed, each party thereto to bear his own costs.

4. That a judgment shall be at once entered in the suit brought by the second party against the first party, now pending in said Superior Court of the City and County of San Francisco, State of California (Department No. 3 thereof), numbered 64,541, in favor of the second party and against the first party for the sum of $523,162.52 together with interest thereon at the rate of six per cent per annum from the 1st day of April, 1898, both in United States gold coin and providing for a sale of the pledged securities sought to be foreclosed in said suit, and with the usual provisions for the docketing of a judgment against the first party for any deficiency which may exist after the sale of the collaterals specified in the original complaint in said suit; that all proceedings to enforce said judgment be stayed for the period of six months after the date of this agreement.

5. That the parties hereto hereby designate and appoint the Bank of California, a corporation, as trustee for them, to hold the properties and written instruments hereinafter mentioned for the purposes

hereinafter set forth, and to perform the duties hereinafter prescribed.

6. That the first party shall deliver to said trustee:

a. All of the shares of the capital stock of said Coos Bay, Roseburg & Eastern Railroad & Navigation company in excess of the 10,001 shares thereof now held by the second party, certificates therefor to be properly endorsed, excepting seven shares thereof to be issued to the Directors of said Company as hereinafter provided.

b. The resignation of all of the directors of said Company now in office, the same to take effect upon the election of the directors hereinafter named.

c. A release executed by the first party releasing and discharging the said Beaver Hill Coal Company of and from any and all claims and demands which he may now have or claim to have against said Company, said release not to take effect, however, except upon the failure of the first party to pay or cause to be paid to said trustee, for the use and benefit of the second party, the sum of $550,000.00 gold coin of the United States, as hereinafter provided.

d. A release executed by the first party releasing and discharging the said Coos Bay, Roseburg & Eastern Railroad & Navigation Company of and from any and all claims and demands which he may now have or claim to have against said Company; also a disclaimer of all right, title or interest in or to any of the property of said Com-

pany, including the equipments and rolling stock of the railroad, and the spur tracks to the mine of the Beaver Hill Coal Company, and to the mine of the Beaver Coal Company, the same being known as the "Klondike Mine," said release and disclaimer not to take effect, however, except upon the failure of the first party to pay or cause to be paid to said trustee, for the use and benefit of the second party, said sum of $550,000.00 gold coin of the United States, as hereinafter provided.

That the second party shall deliver to said trustee:

a. The certificate for the 10,001 shares of the capital stock of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company heretofore pledged to the second party by the first party, said certificate to be properly endorsed by the second party.

b. All of the bonds of the said Coos Bay, Roseburg & Eastern Railroad & Navigation Company heretofore pledged by the first party to the second party, and now in its hands, of the par value of $620,000.00.

c. Assignments, in proper form, to said trustee, of all judgments of record which have been rendered in the courts of Coos County, in the State of Oregon, in favor of the second party, and are now held by it as collateral security for the payment of moneys owing to it by the first party.

d. All of the shares of the capital stock of said Beaver Hill Coal Company, excepting one share

thereof to be issued to each one of the present directors of said Company, but said shares of stock issued to said directors shall be duly endorsed and delivered by them to said trustee as soon as possible hereafter, the same to be then held by said trustee together with the other shares of said stock for the uses and purposes hereinafter set forth.

e. A satisfaction, in proper form, and duly acknowledged of said judgment entered in said suit mentioned in paragraph number four of this agreement.

*That the first and second parties shall jointly execute and deliver to said trustee a deed to the following described property situate in the Town of Marshfield, in Coos County, Oregon,* sufficient in form and substance to vest the title thereto in said trustee, to wit:

> All of blocks numbered one (1), two (2), six (6), eight (8), sixteen (16), twenty-one (21), twenty-eight (28), thirty-three (33), thirty-four (34), thirty-five (35), thirty-six (36), thirty-seven (37), forty-six (46), forty-seven (47), forty-eight (48), forty-nine (49), fifty-two (52), fifty-three (53), fifty-four (54), fifty-seven (57), fifty-nine (59), sixty-three (63), sixty-six (66), sixty-seven (67), seventy (70), seventy-one (71), seventy-five (75), seventy-seven (77), eighty (80), eighty-one (81), eighty-four (84), eighty-five (85), also block lettered "C," also lots one (1) and two (2) and lots eight (8) to forty (40) inclusive, in block numbered fifty-six

(56), in "Railroad Addition to Marshfield," according to the plat of said Addition made by G. H. Spencer, and duly recorded in the office of the County Recorder of said Coos County, Oregon.

7. That there shall be transferred and issued to each of the following-named persons, to wit: William L. Pierce, Frederick S. Samuels, W. S. Chandler, S. H. Hazard, R. A. Graham, J. W. Bennett and T. R. Sheridan, one share of the capital stock of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, which said shares of stock shall be duly endorsed and delivered by them to said trustee as soon as possible hereafter, the same to be then held by said trustee together with the other shares of said stock for the uses and purposes hereinafter set forth. That a meeting of the directors of said Company shall be called for the reorganization of the Board of Directors of said Company, and at said meeting the persons above named shall be elected to serve as directors of said Company during the life of this agreement, and until their successors are elected and qualified. Upon their election, as such directors, there shall be signed by each of said parties a written resignation of his said office as director, the same to be then delivered to said trustee; such resignation not to take effect, however, except as hereinafter provided.

8. The first party shall remain as manager of said Coos Bay, Roseburg & Eastern Railroad &

Navigation Company during the life of this agreement, and subject to the terms hereof. At all times during the life of this agreement the second party shall be entitled to have a representative in the County of Coos, State of Oregon, who shall be permitted at all times, upon demand, to inspect all books, papers and vouchers of every kind connected with the business of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company. Said Company shall be operated during the life of this agreement as a railroad corporation and common carrier of passengers and freight for hire, and shall not be used to further the personal purposes or enterprises of any individual in any manner which will not be to the best interests of said Company, and shall offer no special advantages in freights or fares, rebates or credits to any individual not granted to the community by general tariff and regulation. It is agreed that the rate of forty cents per ton heretofore fixed for the transportation of the coal of the Beaver Coal Company over said railroad shall not be changed during the life of this agreement.

9. That if, at any time within six months from the date of this agreement, the first party shall pay or cause to be paid to the said trustee, for the use and benefit of the second party, the sum of $550,000.00 in gold coin of the United States, the title to all of the shares of stock, bonds, real property and

judgments below mentioned shall thereupon vest in, and the same shall become the absolute property of the first party; and said trustee is hereby authorized and directed to thereupon deliver to the first party, and the second party hereby obligates itself to cause to be thereupon delivered to him:

a. All of the capital stock of said Beaver Hill Coal Company placed in the hands of said trustee, and all of the shares thereof issued to said directors of said Company, all duly endorsed.

b. All of the capital stock of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, placed in the hands of said trustee, and all of the bonds of said Company placed in the hands of said trustee.

c. A good and sufficient deed of conveyance executed by said trustee to the first party, of the above described real property in said town of Marshfield.

d. Assignments, in proper form, executed by said trustee to the first party, of all said judgments in favor of the second party assigned by it to said trustee, as hereinabove provided, or, if said judgments, or any of them, have been collected by said trustee, then to pay over the moneys collected thereon to the first party.

e. Said satisfaction of said judgment entered in said suit mentioned in paragraph number four of this agreement.

f. The resignations of the following directors of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, to wit:

William L. Pierce,
Frederick S. Samuels,
W. S. Chandler, and
S. H. Hazard,

said resignations to then take effect.

g. Said release executed by the first party in favor of said Beaver Hill Coal Company, and said release and disclaimer of the first party in favor of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company.

And said trustee shall at the same time deliver to the second party said sum of $550,000.00 in gold coin of the United States.

Said payment of said sum of $550,000.00 in gold coin of the United States to said trustee, for the use and benefit of the second party, shall operate as a full settlement, satisfaction and discharge of all claims and demands of every kind and nature whatsoever now existing in favor of either party hereto against the other; and of all claims and demands of every kind and nature whatsoever now existing in favor of the second party against said Beaver Hill Coal Company and said Coos Bay, Roseburg & Eastern Railroad & Navigation Company.

The second party further agrees that it will, upon demand of the first party at any time after the payment of said sum of $550,000.00 to said

trustee, execute a proper consent in writing to the cancellation of that certain order heretofore given by said Coos Bay, Roseburg & Eastern Railroad & Navigation Company to the Farmers Loan & Trust Company, directing the delivery by said Farmers Loan & Trust Company to the second party of the bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, as they may be issued from time to time.

10. Should the first party fail to pay or cause to be paid to the said trustee for the use and benefit of the second party, within said six months from the date hereof, said sum of $550,000.00, in gold coin of the United States, *the title to all of the shares of stock, bonds, real property and judgment above mentioned shall, at the expiration of said six months,* vest in and the same shall become the absolute property of the second party; and said trustee is hereby authorized and directed to thereupon deliver to the second party:

a. All of the capital stock of said Beaver Hill Company placed in the hands of said trustee, duly endorsed.

b. All of the capital stock of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company placed in the hands of said trustee, and all of the bonds of said Company placed in the hands of said trustee.

c. A good and sufficient deed of conveyance executed by said trustee to the second party of the above described real property in said town of Marshfield.

d. Assignments, in proper form, executed by said trustee, to the second party of all said judgments in favor of the second party assigned by it to said trustee, as hereinabove provided, or, if said judgments, or any of them, have been collected by said trustee, then to pay over the moneys collected thereon to the second party.

e. The resignation of the following directors of the said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, to-wit:

R. A. Graham, T. E. Sheridan and J. W. Bennett, said resignation to then take effect.

f. Said release executed by the said party in favor of said Beaver Hill Coal Company, and said release and disclaimer of the first party in favor of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company.

And said trustee shall at the same time deliver to the first party said satisfaction of said judgment entered in said suit mentioned in paragraph number four of this agreement; and second party shall cause said Coos Bay, Roseburg & Eastern Railroad & Navigation Company to execute and deliver to the first party a release and discharge of any and all claims and demands which it may have or claim to have against the first party. And all matters and things in dispute between the parties hereto, or between the first party and said Beaver Hill Coal Company and said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and all claims and demands shall be and become, by virtue hereof, finally and forever settled and determined.

11. Upon the performance by said trustee of the acts hereinabove provided to be done by it, said trust shall cease and determine.

12. The second party further agrees to cause to be executed and delivered by said Beaver Hill Coal Company to said T. R. Sheridan, of Roseburg, Oregon, upon the execution of this agreement, a quit-claim deed to the northeast quarter of section nineteen, township twenty-seven south of range thirteen west of the Willamette Meridian; also to cause to be executed and delivered by A. B. Spreckels (the Vice-President of the second party), to the trustee hereunder, upon the execution hereof, an agreement whereby the first party shall be given the option and right to purchase from said A. B. Spreckels all his right, title and interest in and to that certain real property in said Coos County, Oregon, Known as and called the "Chadwick Tract", upon the payment by the first party to said A. B. Spreckels of the sum of money paid by said A. B. Spreckels for said right, title and interest in and to said property, together with interest thereon at the rate of six per cent per annum, said agreement for said option not to take effect, however, except in the event that the first party shall pay said sum of $550,000.00 to said trustee for the use and benefit of the second party within said six months from the date hereof, as hereinabove provided.

13. The second party further agrees that it will re-deliver to the first party that certain policy of

life insurance issued to the first party by the New York Life Insurance Company, numbered 664,673, and now held by the second party together with a waiver by it of all claim to or interest in said policy, upon the payment to it by the first party of the sum of $2950.00, at any time during the life of this agreement.

14. It is mutually agreed that time shall be the essence of this agreement and that this agreement shall inure to the benefit of and shall bind the heirs, executors, administrators, successors or assigns of the respective parties hereto.

In witness whereof, the first party has hereunto set his hand and the second party has caused its corporate name and seal to be hereunto affixed by its President and Secretary, the day and year first above written.

Done in duplicate.

Witnesses to signature of:
R. A. Graham.
Isaac Froham.
E. D. Preston.

R. A. Graham.

J. D. Spreckels & Bros. Company.

By J. D. Spreckels,
Its President.
Chas. A. Hug,
Its Secretary.

(Corporate Seal.)

We hereby accept the foregoing trust.

Bank of California.
S. S. Smith.